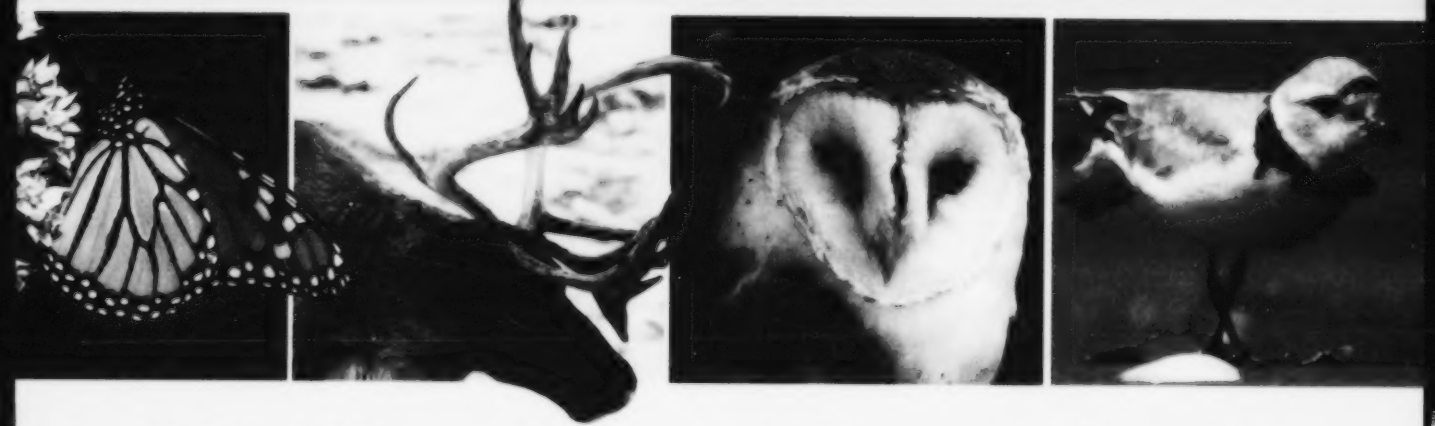
THE LAST LINE OF DEFENCE

A Review of Ontario's New Protections for Species at Risk



A Special Report to the Legislative Assembly of Ontario
February 2009

E C O
C E O
Environmental
Commissioner
of Ontario

Environmental
Commissioner
of Ontario

Gord Miller, B.Sc., M.Sc.
Commissioner

Commissaire à
l'environnement
de l'Ontario

Gord Miller, B.Sc., M.Sc.
Commissaire

February 2009

The Honourable Steve Peters
Speaker of the Legislative Assembly of Ontario

Room 180, Legislative Building
Legislative Assembly of Ontario
Province of Ontario

Dear Mr. Speaker,

In accordance with section 58(4) of the *Environmental Bill of Rights, 1993*, I present the attached Special Report of the Environmental Commissioner of Ontario for your submission to the Legislative Assembly of Ontario.

This Special Report concerns the protection and recovery of Ontario's species at risk. I am releasing this report to provide the Members of Provincial Parliament and the public with my assessment of the measures that are currently in place to conserve Ontario's most vulnerable species and the habitats upon which they depend. I hope that this Special Report will help to provide a foundation for the effective implementation of the *Endangered Species Act, 2007*, a key component of the conservation of Ontario's biodiversity.

Sincerely,

Gord Miller
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Defensive action – delaying action – is always terribly busy and reflexive and reactive, simply because there usually is not time in which to regroup, dig in, consider, and strategise. Confusion and fragmentation – and exhausting flailing – often follow. Such would be my characterization of wildlife conservation: we dart about, stamping at tiny smoulders in the carpet, rushing from hot spot to hot spot, when all the while the roof is racing to a fire-storm and the walls are creaking toward collapse.

John A. Livingston, The Fallacy of Wildlife Conservation

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EXECUTIVE SUMMARY

One of the core purposes of the *Environmental Bill of Rights, 1993* is "(t)he protection and conservation of biological, ecological and genetic diversity." It is the role of the Environmental Commissioner of Ontario to hold the government accountable for decisions it makes to protect and conserve the environment. In fulfillment of this responsibility, the Environmental Commissioner of Ontario is tabling this Special Report to highlight the critically important issue of the protection and recovery of Ontario's species at risk. This Special Report reviews Ontario's new *Endangered Species Act, 2007* and recommends additional steps by the Government of Ontario to protect and recover species at risk and their habitats.

On June 30, 2008, Ontario's new *Endangered Species Act, 2007* came into force. It replaced an out-dated law that was widely viewed as ineffective. The Ontario government introduced this new law with the goal of becoming a world leader in the protection and recovery of species at risk.

In Ontario, there are currently 183 species identified as extirpated, endangered, threatened, or of special concern. At least six species native to Ontario are known to have become extinct in modern times. Experts from around the globe have reached a consensus that the loss of biodiversity is unequivocally at a crisis point. The conservation of biodiversity should be a priority for all governments.

Effective species at risk legislation, when properly implemented and enforced, serves as the last line of defence for species at risk. These plants and animals may disappear forever if nothing is done to improve their imperilled state. Ideally, other government measures also exist to effectively conserve biodiversity and to prevent species from becoming at-risk in the first place.

The *Endangered Species Act, 2007* contains some much-needed advances in the protection of species at risk. It recognizes a wider range of at-risk species, not just a select few that are the most imperilled. Independent experts, free from political interference, will now be responsible for evaluating which species are at-risk and creating the list of species to be regulated. These changes are positive steps.

The new law generally prohibits the killing or harming of threatened and endangered species, as well as the destruction of their habitat. It requires the Ministry of Natural Resources (MNR) to ensure that recovery strategies are prepared for all endangered and threatened species within set timelines. Moreover, the Minister of Natural Resources must issue statements that detail what the Ontario government will do to protect each of those species.

The application and implementation of these aspects of the law will be critically important to gauge its effectiveness in protecting species at risk in the years to come.

Despite the many advances found in the new law, there remain holes in this safety net for Ontario's species at risk. For example, the general habitat protections do not apply for five years for endangered and threatened species that were not covered under the old law, unless a species-specific habitat regulation is passed. There also are no requirements to develop such regulations for any of the species that are currently listed.

While the Ontario government promoted the flexibility of this new law as one of its key attributes, it is this very flexibility that – if misapplied – most threatens to unravel the safety net. For example, the requirement to prepare recovery strategies for all endangered and threatened species and management plans for species of special concern is weakened by the government's discretion to determine what actual recovery efforts will be undertaken.

Similarly, while the previous legislation included strict habitat protection requirements, the new law's flexible approach allows for a mix of approved uses within protected habitat. Most significantly, the government has discretion to issue approvals for activities that would otherwise be prohibited (i.e., harming species at risk or their habitat). These provisions contain broad powers which, if not exercised with great care, have the troubling potential to significantly undermine the law's basic purpose of species protection. Therefore, the law's success in adequately protecting and restoring species at risk will significantly rely on how the law is applied.

To date, the Ontario government has not prescribed approvals issued pursuant to the *Endangered Species Act, 2007* under the *Environmental Bill of Rights, 1993*. As a result, the public is denied the right to open, transparent, and accountable government decision-making related to these approvals that harm species at risk. This failure is disappointing, but could be easily remedied.

The Environmental Commissioner of Ontario (ECO) strongly believes that conserving biodiversity – including protecting species at risk – is unequivocally a government-wide responsibility and a provincial interest, beyond just the responsibility of MNR. Without concrete measures and swift action, many of Ontario's wild species and the natural areas they depend upon may be lost forever. This Special Report outlines five key action items to ensure successful implementation of the new law, as well as six recommendations for the Ontario government to better protect and restore the province's most vulnerable species.

section one

introduction

Section 1 – Introduction

Biodiversity – wildlife and natural areas – is being lost at the fastest pace in human history. It is estimated that humans have increased species extinction rates by as much as a thousand times above the natural background rates that were typical over Earth's history. A species is considered at-risk when it may disappear entirely if nothing is done to improve its status.

This loss of biodiversity is part of a global environmental crisis. The most significant causes for the loss of biodiversity are habitat alteration and loss, climate change, invasive alien species, overexploitation, and pollution (see Figure 1). In Ontario, scores of species are in jeopardy and face imminent extinction or extirpation. Without immediate and sustained action, future generations of Ontarians will be surrounded by a natural world that bears little resemblance to that of the present day.

The Environmental Commissioner of Ontario (ECO) has long called for stronger legal protection and better conservation measures for Ontario's species at risk. The need for reforming the *Endangered Species Act* has been covered in six separate Annual Reports tabled before the Ontario Legislature (see Appendix I). It has been the subject of three separate applications under the *Environmental Bill of Rights, 1993*, each of which was denied by the government of the day. Based on these concerns, the ECO recommended in our 2002/2003 Annual Report that

> the Ministry of Natural Resources create a new legislative, regulatory and policy framework to better protect Ontario's species at risk and to conform with federal legislation.

The Government of Ontario has recently made sweeping reforms to its legal framework for species at risk (see Appendix II). In light of these recent changes, the ECO has produced this Special Report to analyze the adequacy of the province's new legal framework and conservation measures to protect and restore its most vulnerable species.

Effectively protecting species at risk is inherently connected to the larger issue of conserving Ontario's biodiversity. The ECO has repeatedly expressed strong concerns over the failure of the Ontario government both to grasp the severity of this environmental crisis and to understand that it has a direct responsibility to take concrete action. Our 2007/2008 Annual Report states:

> The ECO is profoundly concerned about the lack of deliberate, systematic, and coordinated government action to conserve Ontario's biological diversity. All too often, ministries such as MNR are seemingly forced into a conflicted role, having to advocate for the very resource extraction and utilization undertakings that can jeopardize biodiversity. Instead, their roles should be cast as champions of biodiversity in order to effectively stave off this environmental crisis and to uphold the public interest.

The international community is firmly committed to achieving "a significant reduction of the current rate of biodiversity loss" by the year 2010. The international community has also agreed that "(u)nprecedented additional efforts are needed, and these must be squarely focused on addressing the main drivers of biodiversity loss." The ECO believes that the Ontario government should fulfill its responsibility to conserve the province's biodiversity.

Primary Threats to Ontario's Species at Risk

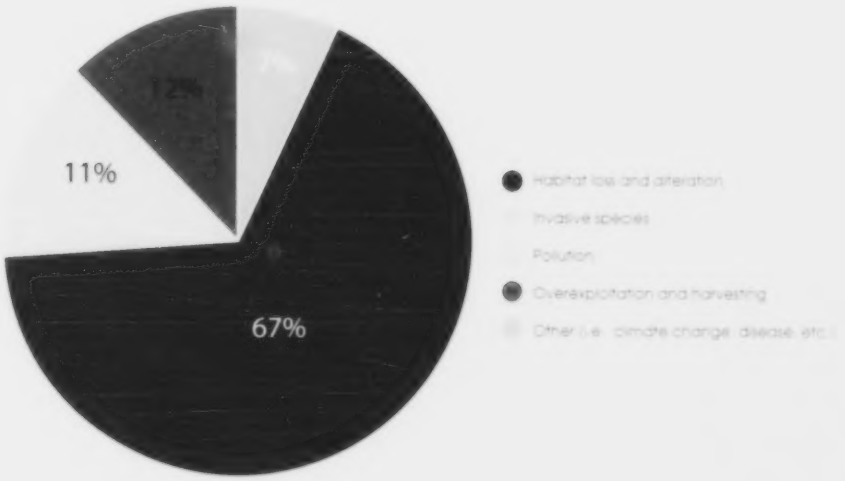
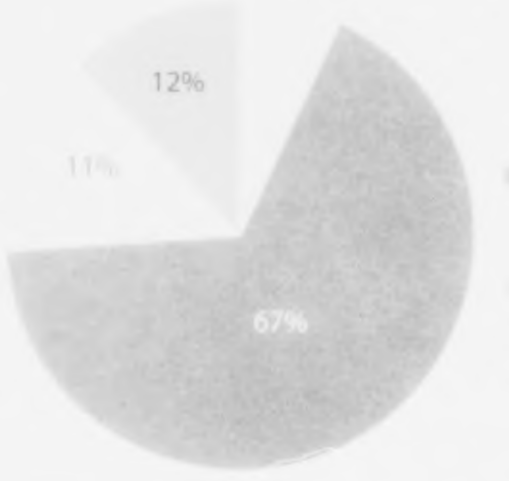
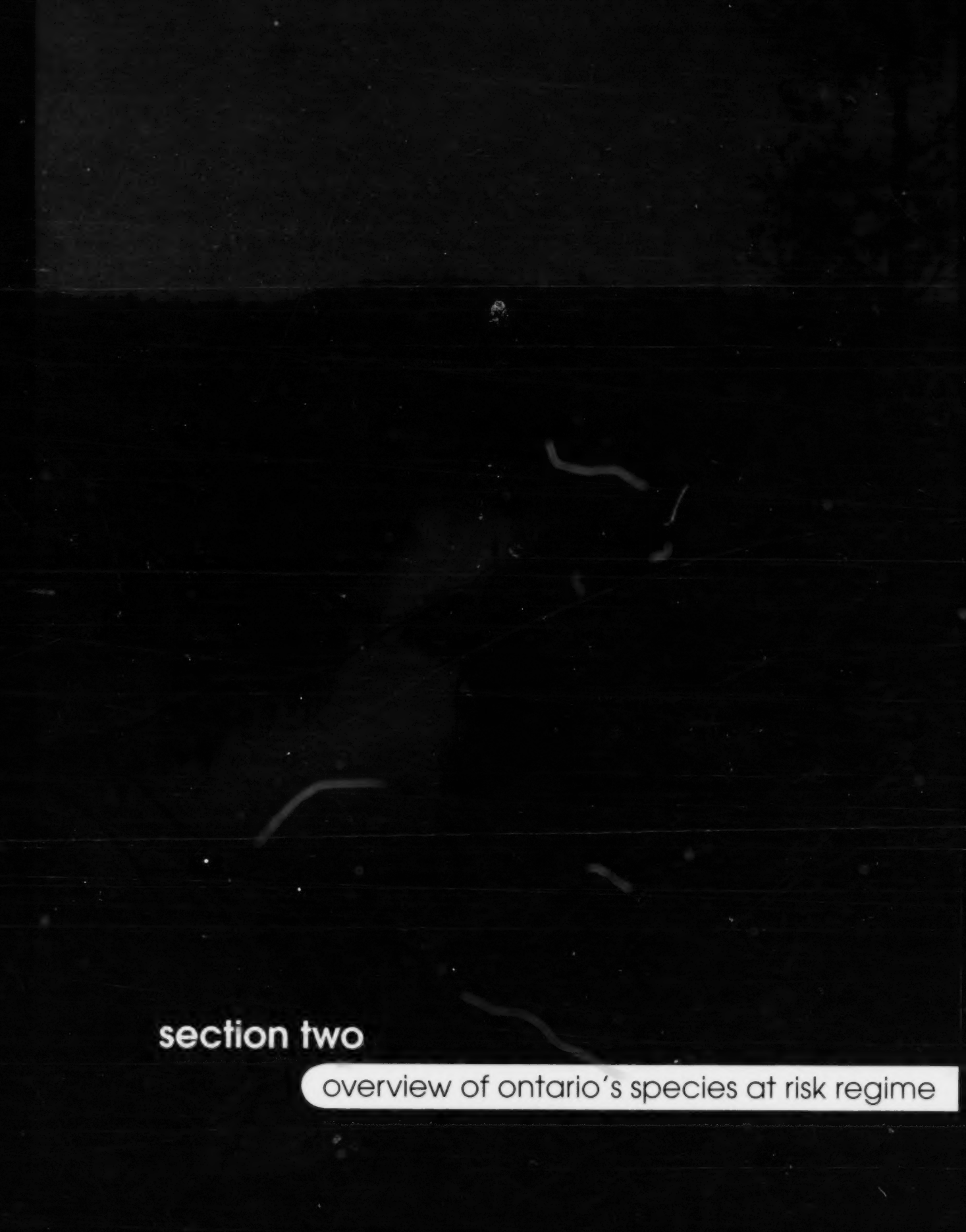


Figure 1. This figure illustrates the primary identified threats to species at risk as a total percentage for all species at risk in the province, based on data from MNR and the Royal Ontario Museum. Habitat loss, including alteration and fragmentation, is the main threat for approximately two-thirds of Ontario's species at risk. However most species at risk face multiple threats in varying levels of severity. For example, hunting was likely the primary cause of the extinction of eastern elk (*Cervus elaphus canadensis*), but the loss of suitable forest habitat played a significant secondary role in their demise. Moreover, it is well-documented that climate change will be an increasing threat to a large number of species at risk in the years to come.

Primary Threats to Ontario's Species at Risk





section two

overview of ontario's species at risk regime

Section 2 – Overview of Ontario's Species at Risk Regime

The Ministry of Natural Resources (MNR) has the lead role in protecting and recovering Ontario's species at risk. The ministry also manages the province's protected areas, forests, fisheries, wildlife, and the 87 per cent of the province that consists of Crown lands. MNR's strategic mission is "to manage our natural resources in an ecologically sustainable way to ensure that they are available for the enjoyment and use of future generations. The ministry is committed to conserving biodiversity and using natural resources in a sustainable manner."

The Old Law – *Endangered Species Act* (1971)

The Ontario government enacted its original *Endangered Species Act* in 1971. This law was ground-breaking in its day, but failed to keep pace with advancements in public policy and science. This statute was barely over a page long and contained only six sections. The old law initially regulated only four species, and by 2008 just 42 species were covered.

Under the old law, the ministry only regulated select "endangered species," thereby granting limited protections to only a minority of Ontario's species at risk. The majority of species at risk were classified by MNR only in ministry policy, which held little legal weight. For example, species such as the spotted turtle (*Clemmys guttata*) and American ginseng (*Panax quinquefolius*) were listed in ministry policy as endangered, but the law itself did not specifically recognize or protect them in any way. Species at risk that are threatened or of special concern were not captured by the old law. Further, MNR chose not to regulate endangered species of fish under this law.

This dysfunctional approach to classifying species was a major weakness of the old law, and served as a significant barrier to protecting species at risk. Glaring inadequacies with this approach prompted Ontario residents to file several applications for review under the *Environmental Bill of Rights, 1993* over the past decade, each of which MNR denied.

The old law required that habitat of listed species be protected, with no exceptions. This approach was criticized as being excessively rigid, leading to an "all or nothing" regime for species protection that produced irresolvable conflicts between the property rights of landowners and the public good of protecting species. Avoiding these conflicts led to reluctance by governments to list new species under the legislation. In the end, the lack of tools to make habitat protection work meant that the law served neither landowners, government or – most importantly – species at risk themselves.

The old law's failure to expressly define "habitat" caused significant problems in enforcement as well as in land use planning that affected species at risk. The weak language and the lack of definitions partly explain why the government undertook only a handful of prosecutions in the 37 years that the old statute was in force.

The old law contained few precautionary or proactive provisions to ensure that Ontario's biodiversity would not become further imperilled. The old law did not require any form of management for species at risk, let alone any form of recovery planning.

Ontario's experience with the old *Endangered Species Act* demonstrates the significant role that the structure of public policy plays in determining the success or failure of a particular initiative. This fact became increasingly apparent as calls for its reform grew in recent years.

The Need for Law Reform – *Endangered Species Act, 2007*

The state of Ontario's species at risk has worsened in recent decades. Increases in the number of species at risk are based on observable declines in population levels, and a more thorough understanding of the actual state of species. There are now 183 species designated as extirpated, endangered, threatened, or of special concern. Further, there are more than 1,500 species being tracked by MNR's Natural Heritage Information Centre that have not yet been formally assessed for their at-risk status in Ontario.

Only two species protected under the old law – the bald eagle (*Haliaeetus leucocephalus alascanus*) and the peregrine falcon (*Falco peregrinus*) – have recovered in the last decade and, as a consequence, had their at-risk status improve. In contrast, eight of the species that are associated with Ontario's forests had their status deteriorate. Further, the total number of identified species at risk that are associated with forests more than doubled from 42 to 89 species between 2000 and 2005, according to MNR's 2006 State of the Forest Report, although this rise is likely due, in part, to a higher level of scrutiny of the abundance and range of species.

The forest-dwelling (woodland) population of **woodland caribou** (Rangifer tarandus caribou) is listed as a threatened species. MNR estimates that 20,000 woodland caribou remain in Ontario, of which approximately one-quarter inhabit the boreal forests and are known as the forest-dwelling population. This species at risk was discussed in our 2006/2007 Annual Report. The ECO expressed grave concerns about the long-term survival of Ontario's woodland caribou and that MNR's draft recovery strategy was best described as an endorsement of the *status quo*, while imposing a further delay in taking tangible action. The ECO also stated that the scope of genuine protection prescribed for their habitat "will be a measure of the effectiveness" of the *Endangered Species Act, 2007*.

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The release of Ontario's Biodiversity Strategy in 2005 reflected a notable shift in the government's position. It publicly recognized the need to reform the province's species at risk legislation. This strategy stated that reforms were needed "to provide broader protection for species at risk and their habitats, and to include requirements for recovery planning, assessment, reporting and enforcement." Other objectives were to enhance the capacity for stewardship, address the role of private landowners, and to complement the federal *Species at Risk Act*.

The Government of Canada's Species at Risk Act

The Government of Canada's Species at Risk Act *took effect in 2003. Its establishment was an important milestone, although aspects of that legislation and the federal government's implementation have been problematic. For example, the* Species at Risk Act *generally only applies to federal lands that make up a very small percentage of Ontario's land-base. Such lands include national parks, First Nations reserves, military bases, airports, post offices, and Coast Guard stations. The limited jurisdiction of this federal law makes the effectiveness of provincial laws such as Ontario's* Endangered Species Act, 2007 *all the more important.*

The Ontario government launched a review of the legislation governing species at risk in March 2006. The then Minister of Natural Resources also established an independent advisory panel to provide recommendations on possible legislative reforms. The Endangered Species Act Review Advisory Panel ("advisory panel") presented a detailed report to the Minister in August 2006 that contained recommendations related to the legislation, stewardship, and financing. As that report notes,

> In the Panel's view a 'best practices' approach must ultimately be assessed based on its on-the-ground effectiveness in preventing the further endangerment of Ontario's biodiversity and in recovering those species and habitats already at risk. Consequently, our proposals place special emphasis on measures that we believe will contribute to those goals. What should be considered 'best' in our view are those measures that will collectively achieve the ambitious objective of halting and reversing the tide of species decline in Ontario.

The Ontario government largely based its draft legislation on the advisory panel's framework. It also conducted an extensive public and stakeholder consultation process on the proposed legislative reforms. In March 2007, Bill 184 was introduced for First Reading in the Ontario Legislature; two months later, it passed Third Reading and received Royal Assent. The *Endangered Species Act, 2007* came into force on June 30, 2008. (The general framework of the Act is presented in Figure 2.)

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Framework for Protection and Recovery under the *Endangered Species Act, 2007*

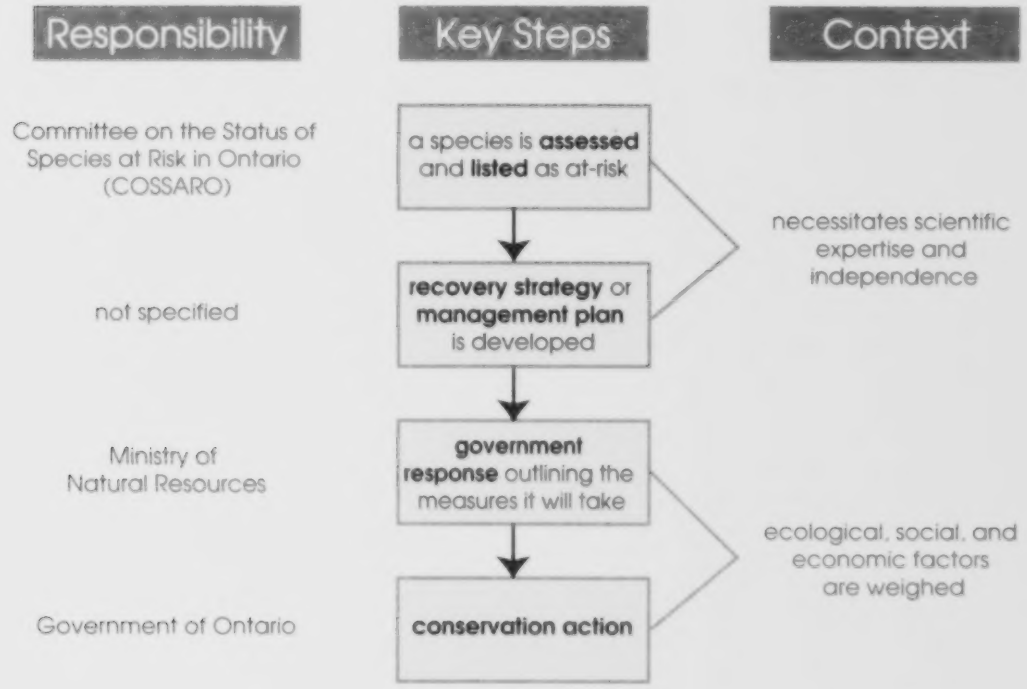

Responsibility
Key Steps
Context
Committee on the Status of Species at Risk in Ontario (COSSARO)
a species is **assessed** and **listed** as at-risk
not specified
recovery strategy or **management plan** is developed
necessitates scientific expertise and independence
Ministry of Natural Resources
government response outlining the measures it will take
Government of Ontario
conservation action
ecological, social, and economic factors are weighed

Figure 2. This figure illustrates the general framework of the new legislation. The listing of species at risk and the development of plans to protect them are now intended to be an impartial and science-based process. The government must then detail the steps it will take to conserve the species.

Public Consultation on the Endangered Species Act, 2007 *(Bill 184)*

In our 2006/2007 Annual Report, the ECO commended MNR on the measures it took to ensure a thorough public consultation process on Bill 184, particularly in its use of the Environmental Registry.

In May 2006, MNR posted a proposal notice on the Environmental Registry with a 59-day public comment period, supplemented by a stand-alone online questionnaire for the public to complete. The ministry also released a discussion paper to provide background information to the public, and to identify various options for changes to the legislation. In December 2006 and March 2007, the ministry then allowed for two additional 30-day public comment periods. MNR also concurrently held meetings with a wide range of stakeholders.

In April 2007, after Second Reading in the Ontario Legislature, Bill 184 was referred for debate before the Standing Committee on General Government. The committee heard presentations from 32 organizations representing forestry, mining, hunting, agricultural, environmental, First Nations, municipal, and private charitable interests.

The ministry received 2,001 public comments during the various phases of its public consultation. These submissions included 302 responses to the ministry's online questionnaire, in addition to more than 1,200 form letters supporting legislative reform. In general, there was broad public support for the Ontario government to revise the legislation to better protect Ontario's species at risk.

section three

purposes and principles

Section 3 – Purposes and Principles

The law's preamble recognizes that biodiversity is under threat globally and that the *Endangered Species Act, 2007* is one method to address this crisis in Ontario. This overarching statement is a welcome advancement, providing insight into how the law should be implemented and enforced. The preamble also acknowledges that species are "being lost forever at an alarming rate" and it is "most often due to human activities, especially activities that damage the habitats of these species." The three stated purposes of the law are:

- to identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge;
- to protect species that are at risk and their habitats, and to promote the recovery of species that are at risk; and
- to promote stewardship activities to assist in the protection and recovery of species that are at risk.

The *Endangered Species Act, 2007* explicitly recognizes the precautionary principle, in both its preamble and its provisions on recovery strategies. The law cites the international Convention on Biological Diversity, stating that "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat." The inclusion of the precautionary principle is significant: it should make clear to both the government and the public how the law should be applied and implemented, especially if guidance is needed to resolve competing interests.

No Mechanisms to Prevent Species from Becoming At-Risk

The advisory panel stressed that the Ontario government must take a broad approach to conserving the province's biodiversity in order to prevent species from becoming at-risk. The advisory panel's report states,

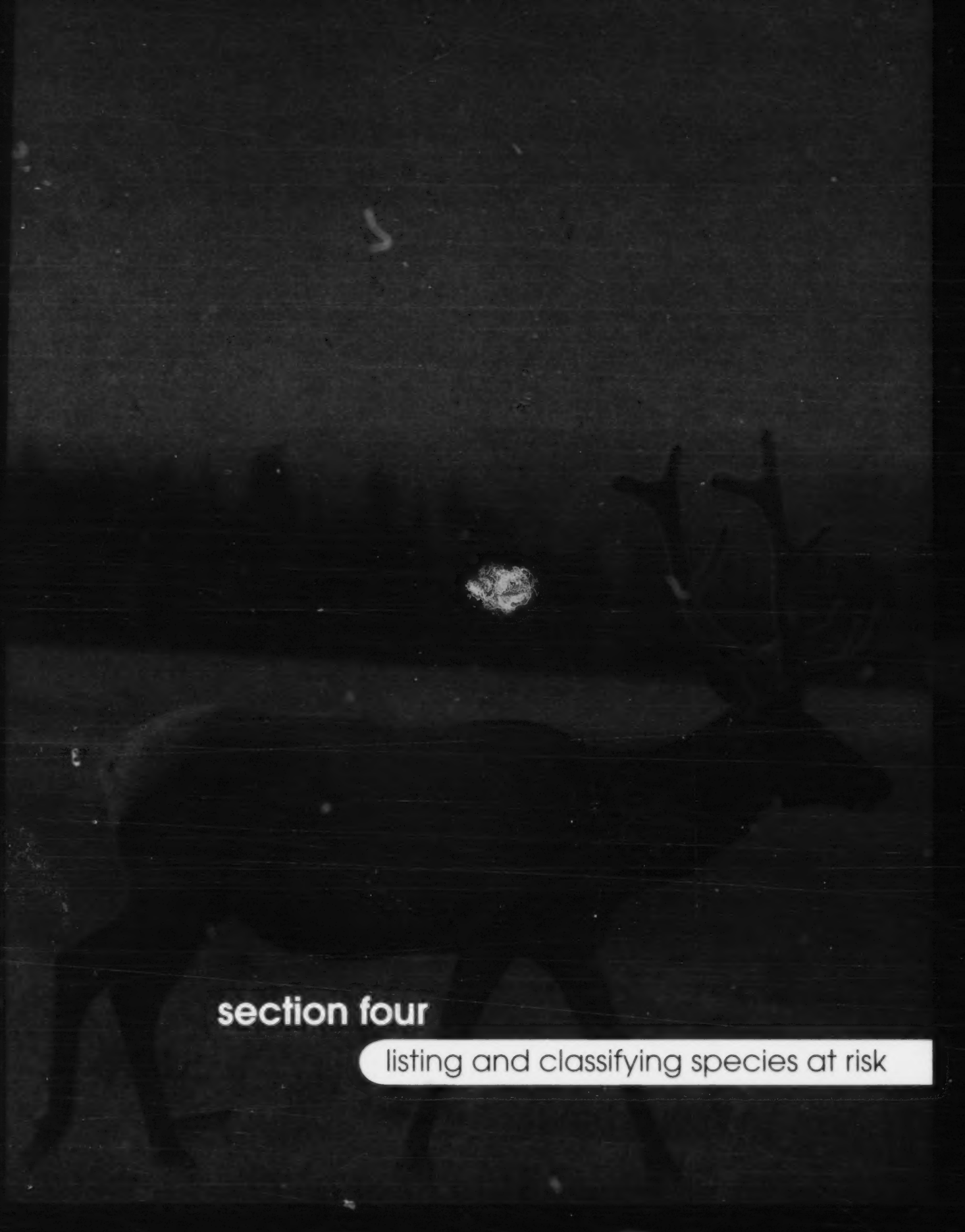
> Although beyond the specific purview of the endangered species legislation, the Panel urges specific mention in the Act of other elements of Ontario's native biological diversity that would similarly benefit from preventive measures. For those species that are not considered to be at risk or not adequately assessed, additional provisions may assist in ensuring that such species do not become at risk in the future. The Panel recommends that legislation require the Ministry of Natural Resources and partners to actively monitor Ontario's biological diversity and to provide the resources necessary to keep our knowledge of the status of Ontario's species up to date.

MNR did not act on this recommendation. Indeed, the ECO first urged MNR in our 2001/2002 Annual Report to "undertake a comprehensive assessment of Ontario's current policies, regulations and Acts, and enact appropriate changes to conserve the province's biodiversity." This concern was again reiterated in our 2007/2008 Annual Report: "(w)hile it may be surprising to some, there is no law in Ontario that actually obligates the government even to monitor biodiversity, let alone expressly conserve it across the province." It is imperative that action be taken by the Ontario government to prevent species from becoming imperilled and, ideally, view the application of the *Endangered Species Act, 2007* as the last line of defence.

Recommendation #1

The Environmental Commissioner of Ontario recommends that the Government of Ontario establish a statutory responsibility for monitoring and reporting on the state of the province's biodiversity.

Barn owls (*Tyto alba*) are listed as an endangered species. In Canada, barn owls breed in southern British Columbia, southern Ontario, and possibly in southern Quebec. Barn owls prefer low-elevation, open country, where small rodent prey are abundant. Their nests are located in buildings, hollow trees and cavities in cliffs. It was long thought that the barn owl may have been extirpated from Ontario, but two dead owls were found in 2000. The barn owl's grassy habitats and prey are threatened by urbanization and changing farm practices. Pesticides and chemicals also contribute to reproductive problems and the poisoning of owls. Further, severe winters limit the survival the barn owl in Ontario. A recovery plan for the barn owl has not been completed. However, MNR has internally targeted a public release date of March 2009 for a proposed habitat regulation for the species.



section four

listing and classifying species at risk

Section 4 – Listing and Classifying Species at Risk

The *Endangered Species Act, 2007* legally recognizes the Committee on the Status of Species at Risk in Ontario (COSSARO). COSSARO is responsible for determining the classification of species at risk: endangered, threatened, special concern, extirpated or extinct (see Figure 3). Historically, this committee was composed primarily of ministry staff. This committee must now function as an independent body, whose members must have relevant scientific expertise or aboriginal traditional knowledge. This shift to the use of an apolitical body of experts is a significant improvement over past practice. A recent study has found that giving this authority to an independent body of experts results in a substantially higher number of species at risk being listed.

At-Risk Status by Species Type and Number in Ontario (2008)

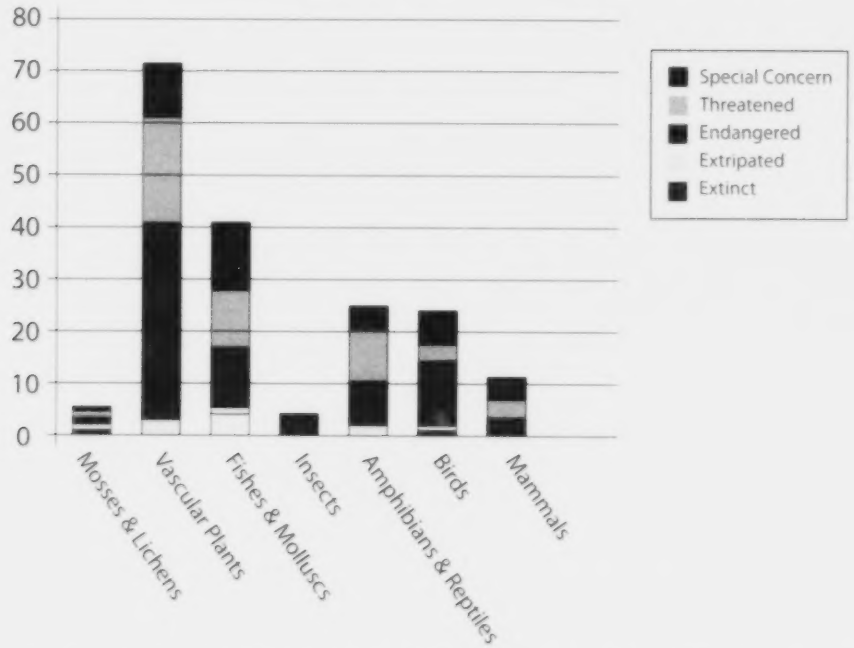


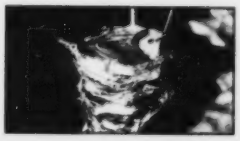
Figure 3. This figure illustrates the at-risk status by species type and number in Ontario, based on O. Reg. 230/08 under the *Endangered Species Act, 2007*.

In October 2008, MNR announced the appointment of the eleven members of COSSARO. While the makeup of the committee reflects a broad range of scientific expertise, the ECO notes that none of its members appear to have been appointed based on expertise drawn from aboriginal traditional knowledge.

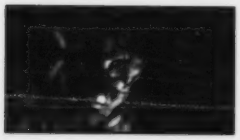
The Minister of Natural Resources has the authority to require COSSARO to assess and classify a species "that may be facing imminent extinction or extirpation" that is not already listed. The Minister also has the authority to require COSSARO to reconsider a classification of a species if "credible scientific information" indicates that a given classification is not appropriate.

Classification of Species at Risk under the Endangered Species Act, 2007

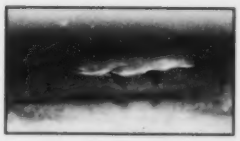
Special concern: it lives in the wild in Ontario, is not endangered or threatened, but may become threatened or endangered because of a combination of biological characteristics and identified threats. Polar bears (Ursus maritimus) *are a species of special concern.*



Threatened species: it lives in the wild in Ontario, is not endangered, but is likely to become endangered if steps are not taken to address factors threatening to lead to its extinction or extirpation. Hooded warblers (Wilsonia citrina) *are a threatened species.*



Endangered species: it lives in the wild in Ontario but is facing imminent extinction or extirpation. Eastern cougars (Puma concolor) *are an endangered species.*



Extirpated species: it lives somewhere in the world, lived at one time in the wild in Ontario, but no longer lives in the wild in Ontario. Paddlefish (Polyodon spathula) *are an extirpated species.*

Extinct species: no longer lives anywhere in the world. Eastern elk (Cervus elaphus canadensis) *are an extinct species.*

A new regulation made under the Act, the Species at Risk in Ontario (SARO) List regulation (O. Reg. 230/08), lists the species that are classified by COSSARO as extirpated, endangered, threatened, and of special concern. This regulation will be amended as necessary by MNR, no later than three months after the ministry has received any report by COSSARO classifying or re-classifying a species at risk. Although it is the responsibility of MNR to file the regulation, COSSARO alone determines its contents.

The advisory panel had recommended that the law allow for citizens to submit a request for an emergency listing of a species. However, such a provision was not incorporated, representing a lost opportunity for the public to bring species forward to COSSARO for consideration. Further, the regulation that lists species at risk was specifically excluded from the application for review provisions under the *Environmental Bill of Rights, 1993* that would allow a similar request by the public (see Section 10 of this Special Report).

In drafting the legislation, MNR acted on the advisory panel's recommendation to require COSSARO to develop criteria for species assessment and classification, but the ministry did not incorporate the requirement that there be periodic reviews of those criteria. The panel also suggested that provisions within the law should have required the development of a procedures manual to direct the operation of COSSARO and explain all aspects of this body to the public, but this recommendation was not acted upon. The law requires that the Minister make the aforementioned criteria publicly available; the ECO expects that MNR will post the criteria on the Environmental Registry for public comment on behalf of COSSARO.

The science-based listing of all species at risk by regulation is a significant improvement on the previous approach taken by MNR. However, the protections afforded by the *Endangered Species Act, 2007* will only be effective for those species that are assessed and appropriately classified in the Species at Risk in Ontario List regulation (O. Reg. 230/08). Therefore, COSSARO's role in the protection of species at risk in Ontario cannot be overstated.

The eastern wolf may provide a sobering example of the consequences of failing to appropriately classify the at-risk status of a species. The current treatment of the eastern wolf as a species of special concern is a carry-over from a now-defunct ministry policy that listed all species at risk in Ontario. In light of recent credible evidence, recognizing the eastern wolf as its own distinct species (rather than as a subspecies of gray wolf) would likely elevate its at-risk status. Re-evaluating the classification of the eastern wolf presents an early opportunity for COSSARO to exercise its responsibility to ensure that species are afforded the protection they need.

No Protections for Ecological Communities at Risk

The advisory panel recommended that ecological communities as a whole – not just individual species – be candidates for assessment, listing, protection, and recovery. It is unfortunate that this recommendation was not adopted. In the past, MNR has undertaken a somewhat similar approach to managing species at risk; the recovery strategy for all species at risk dwelling in the Sydenham River is one example. Further, the authority for the ministry to protect ecological communities at risk would have greatly benefited some of Ontario's most threatened natural areas, such as the few remaining tall grass prairie ecosystems where hundreds of native species dwell.

Extinct Species: Gone, but Not Forgotten?

The Species at Risk in Ontario List regulation (O. Reg. 230/08) made under the *Endangered Species Act, 2007* lists all species in Ontario that are classified as extirpated, endangered, threatened, or of special concern. The regulation does not, however, identify species that are classified as extinct, despite COSSARO's obligation to classify and report on species

that are extinct. In essence, once a species becomes extinct, it will be removed from the list and wiped from the public record. In contrast, the previous ministry policy from which the regulation drew its initial list of species at risk specifically listed extinct species.

The failure to identify species that are extinct in the regulation is a significant shortcoming of the new law. It is critical that a permanent and public record of species that become extinct be maintained. Such a record serves, in part, as a tool for determining the successes and failures of the *Endangered Species Act, 2007*. Although the Minister must make COSSARO's reports available to the public – including information about extinct species – this does not carry the same measure of accountability that would be achieved by listing extinct species in the regulation. Although those species may be irretrievably lost, they, and the lessons to be learned from them, should not be forgotten.

section five

recovery planning

Section 5 – Recovery Planning

Recovery Strategies and Management Plans

Recovery strategies are required for all endangered and threatened species. In contrast, the old law was silent on measures to recover species. The Minister of Natural Resources now has an obligation to ensure that a recovery strategy is prepared within one year of an endangered species being newly listed, and within two years for a threatened species.

The law provides a five-year transition period for the preparation of recovery strategies for endangered and threatened species that were listed when the Act came into force. A recovery strategy will be developed for an extirpated species if the Minister is of the opinion that reintroduction to the province is "feasible."

Recovery strategies must contain:

- an identification of the habitat needs of the species;
- a description of the threats to the survival and recovery of the species;
- recommendations to the Minister on the objectives for the protection and recovery of the species, including how to achieve the objectives; and,
- recommendations to the Minister on the area that should be considered in developing a regulation that defines an area as the habitat of the species.

It is MNR's intention to develop policies relating to recovery strategies. MNR had internally targeted a public release date of December 2008 for these policies; as of January 2009, the ministry has not released this policy. MNR has also indicated that it will be releasing a policy on developing government response statements by April 2009.

For species of special concern, recovery strategies are not needed, but management plans must be developed within five years of a species being listed. An important exception is that management plans are not required to be prepared if a recovery strategy or management plan is required for that species under the federal *Species at Risk Act*. Based on this provision, MNR is only required to ensure the preparation of management plans for 18 of the 46 species of special concern that are currently listed in O. Reg. 230/08.

In contrast to the provisions relating to recovery strategies, the Act does not specify the required contents of a management plan for species of special concern. Failure to adequately manage species of special concern could lead to deterioration in their at-risk status. Given the lack of direction in the Act, the ECO believes that MNR should develop a guideline that lays out the required contents of management plans.

A Key to Successful Implementation

MNR should develop and consult on guidelines that ensure recovery strategies and management plans are robust, effective, and defensible in order to adequately protect and recover species at risk and their habitat.

The law does not specify who should prepare recovery strategies or management plans, or what their qualifications should be (see Figure 2). This omission could jeopardize the recovery planning process as the legislative framework relies on this stage to be science-based. It also necessitates impartiality to ensure that the recovery planning process is not constrained to working within existing government approaches for a particular species, particularly when they may have contributed to its decline. While it is logical that MNR staff would likely be members of a significant number of recovery and management teams, their contribution should not be limited by self-censorship.

Recommendation #2

The Environmental Commissioner of Ontario recommends that MNR ensure that recovery teams and management teams be composed of members with the necessary expertise who are acting independently.

For example, the recovery strategy for the forest-dwelling population of woodland caribou that was finalized in July 2008 was prepared by a recovery team comprised almost entirely of MNR staff. While an independent science review panel found that the recovery strategy is "reasonably sound," the panel expressed concern that the recovery strategy "assumes the status quo and, therefore, fails to confront the central land use planning issues crucial to the success of a recovery strategy. Only a fresh path forward can achieve caribou recovery in Ontario."

Government Response

Once a recovery strategy or management plan is developed, the Minister of Natural Resources is legally bound to issue a response statement that describes the government's course of action for a species within nine months. The *Endangered Species Act, 2007* requires the Minister to ensure that all "feasible" measures contained within its response statement are implemented. The Minister has discretion to consider social and economic factors to decide whether recovery actions are feasible and, therefore, whether they should be implemented.

The government's response to recovery strategies and management plans is one of the most critically important aspects of the new law. It will detail what actions the Ontario government will take to actually protect and recover a given species at risk. For example, it will address the recovery strategy's recommendations for what areas should be prescribed as regulated habitat.

It is problematic that the Minister of Natural Resources is triggered to begin developing a government response statement when the recovery strategy is "prepared." The Act provides no guidance on the meaning of "prepared" which can lead to uncertain timelines for the government to meet its legal obligations.

In the first case of a recovery strategy released under the new law, MNR interpreted the nine-month window as beginning on August 21st, 2008 when the ministry publicly released the recovery strategy for the forest-dwelling population of woodland caribou. The ECO believes that the nine-month window began in July 2008, when the recovery strategy was finalized by the recovery team, as reflected by the date on its cover. While this particular delay is short, delays can manifest into very real impediments to the protection of species at risk.

A Key to Successful Implementation

MNR should ensure that its response statements to recovery strategies and management plans are robust, effective, and defensible and that its commitments are fully implemented in a timely fashion.

There is a problematic provision in the recovery planning component of the law relating to species of special concern. Since provincial management plans are not required for species at risk that are covered by the federal legislation, there is no legal trigger for MNR to prepare a formal government response. As it is the government response that is publicly reviewed and that ultimately determines what actions will be taken for that species, there is the risk that almost two-thirds of the total number of species of special concern may not receive the necessary management and attention.

Recommendation #3

The Environmental Commissioner of Ontario recommends that the Endangered Species Act, 2007 be amended to require the preparation of government responses for all listed species of special concern in order to outline its specific conservation actions for those species.

Delays in the Recovery Planning Process

The Act sets out timelines for the preparation of recovery strategies and management plans. However, the law allows for delays if the Minister believes that the issues involved are complex, if the cooperation of another jurisdiction is required or if priority is given to the preparation of recovery strategies for other species. While the law states that a delay must not occur for the development of a recovery strategy if it will jeopardize the survival or recovery of threatened or endangered species, such a provision is absent from the provision governing delays for the preparation of management plans for species of special concern.

The ECO hopes that the ministry will heed the advisory panel's recommendation that delays should only be based on exceptional circumstances with sufficient justification.

The adherence to established timelines in the recovery planning process is extremely important. The consequence of delays is that a species at risk may become further imperilled or its habitat may deteriorate. The ministry's recovery efforts for the forest-dwelling population of woodland caribou illustrate what occurs when timelines are not adhered to in the recovery planning process:

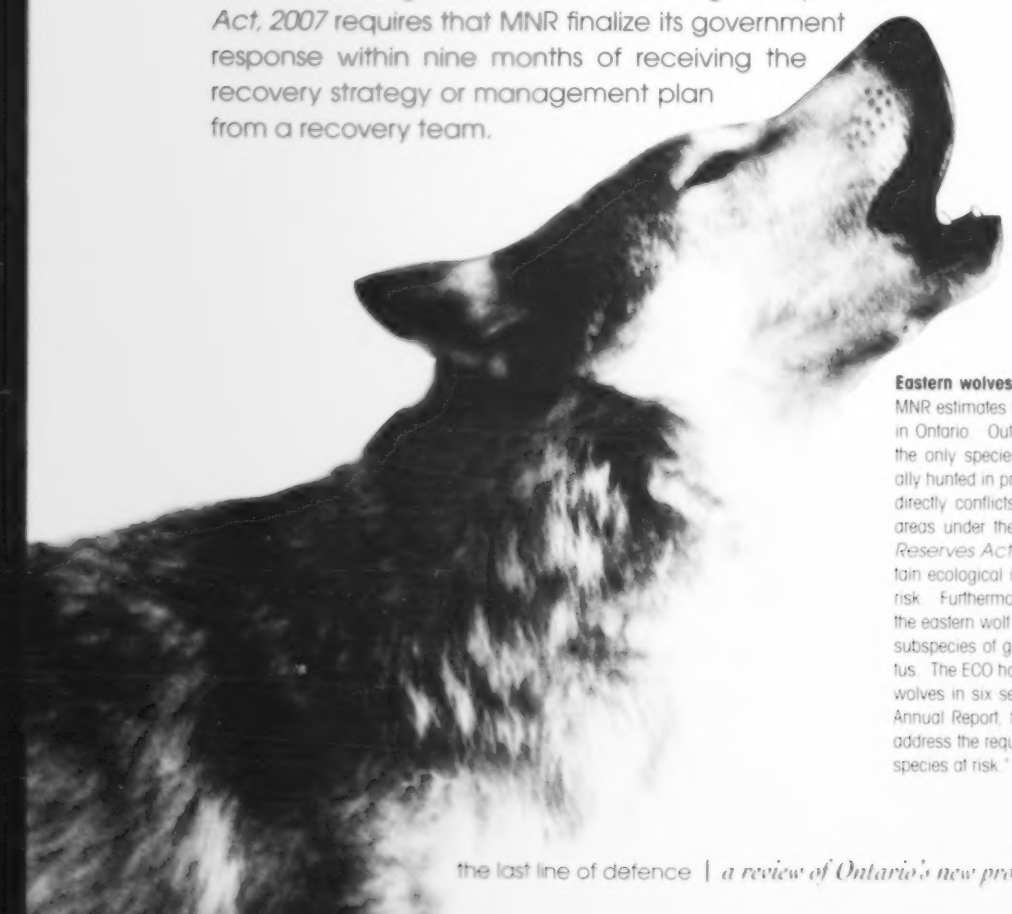
- MNR committed in 2001 to developing a recovery strategy for this threatened species. A finalized recovery strategy was released seven years later, dated July 2008. The *Endangered Species Act, 2007* now requires MNR to have a completed government response by March 2009.
- MNR committed to developing a broader caribou conservation framework by the fall of 2007. Still not completed, the ministry has now set back the release date for a finalized "caribou conservation plan" to June 2009.
- MNR committed to developing a monitoring program for the species by February 2008, but, again, it has not been completed. The ministry committed to this date in its response to an application for review under the *Environmental Bill of Rights, 1993*.
- MNR committed to revising, by 2007, its forestry guideline that directs the management of caribou habitat on Crown lands. This initiative also has not been completed, but it now has been targeted for public release in the fall of 2009.

The ECO noted in our 2006/2007 Annual Report that this lack of progress likely ensures that forest-dwelling woodland caribou will remain a threatened species, if not causing their at-risk status to deteriorate. The ECO also stated that the scope of genuine protection prescribed for the habitat of Ontario's forest-dwelling population of woodland caribou "will be a measure of the effectiveness" of the *Endangered Species Act, 2007*.

Recovery Planning and the Environmental Registry

In the fall of 2007, MNR committed to the ECO to post all recovery strategies and management plans under the *Endangered Species Act, 2007* on the Environmental Registry for public notification. The purpose is to consult the public on the development of the government response: it details what actions the government will take to protect and recover each species. MNR committed to the following three-stage process:

- post a 'policy proposal' notice on the Environmental Registry for a 30-day public comment period when a completed recovery strategy or management plan is received from a given recovery team. This comment period will allow the public to provide input on the issues that MNR should consider in developing its government response that details what conservation measures will be implemented.
- re-post its 'policy proposal' notice to allow a second 30-day comment period once MNR has prepared a proposed (draft) government response. This second comment period will allow the public to comment on the specifics of the proposed steps that will be taken to protect and recover the species.
- post a 'decision notice' with its finalized government response. This notice will also explain how the public comments that were previously submitted were considered by MNR in reaching its decision. The *Endangered Species Act, 2007* requires that MNR finalize its government response within nine months of receiving the recovery strategy or management plan from a recovery team.



Eastern wolves are listed as a species of special concern. MNR estimates that there are 1,500 - 2,500 eastern wolves in Ontario. Out of 183 species at risk, eastern wolves are the only species that the ministry allows to be recreationally hunted in provincial parks. This treatment of the species directly conflicts with the legal purpose of these protected areas under the *Provincial Parks and Conservation Reserves Act, 2006*: the first priority for MNR is to maintain ecological integrity, which explicitly includes species at risk. Furthermore, in light of recent credible evidence, listing the eastern wolf as its own distinct species (rather than as a subspecies of gray wolf) would likely elevate its at-risk status. The ECO has called for increased protections for eastern wolves in six separate Annual Reports. In our 2005/2006 Annual Report, the ECO stated that "MNR urgently needs to address the requirements of managing the eastern wolf as a species at risk."

In its first opportunity to follow this mutually agreed upon process, MNR failed to adhere to its commitment to the ECO. In August 2008, MNR posted an 'information notice' on the Environmental Registry providing a copy of the completed recovery strategy for the forest-dwelling population of woodland caribou (dated July 2008); this notice did not detail MNR's specific responsibilities for the preparation of its government response, nor did it provide any opportunity for public consultation.

It is unclear how or when the public will be consulted, in an open and transparent manner, on the required government response. In this specific case, MNR is legally required to publish a finalized government response by March 2009 – three months earlier than the targeted release date of the ministry's "caribou conservation plan."

section six

protections and prohibitions

Section 6 – Protections and Prohibitions

The *Endangered Species Act, 2007's* protections and prohibitions generally only apply to endangered and threatened species. These provisions prohibit the killing of species at risk and the destruction of their habitat. The timing with which aspects of the *Endangered Species Act, 2007* will be applied are summarized in Table 1.

The law contains numerous transition provisions that provide extended timelines for protections and prohibitions to apply. For example, the general habitat protection provisions will not apply until the year 2013 for the 38 endangered and 48 threatened species that were not listed under the old law, unless species-specific habitat regulations are made earlier.

While transition periods are a legitimate way of phasing in new legislation, the risk in this case is that habitat may be destroyed – and irretrievably lost – in the intervening period. The transition period may also inadvertently encourage the deliberate destruction of habitat before the prohibitions begin to apply. Consequently, it is critical that MNR swiftly prioritize and develop the habitat regulations for these species to ensure that their status is not further jeopardized in the intervening period.

General Habitat Protections

The law prohibits destroying or damaging the habitat of endangered and threatened species. Habitat is defined as either the "area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding," or a specific area defined by regulation for a particular species. If habitat is defined by regulation for a particular species, the regulation prevails.

MNR interprets habitat to include human-created features. For example, a gravel pit inhabited by a blue racer snake (*Coluber constrictor foxii*) or an old farm building that is home to a barn owl (*Tyto alba*) are both "habitat" for purposes of the law.

MNR released a finalized policy that addressed habitat protection for endangered, threatened and extirpated species in July 2008. This policy outlines in general terms what the law specifies, relying on other unreleased policies to provide additional details. However, the policy directs that the "(t)he identification and description of habitat will be science-based and will follow an accountable and transparent process. Identification and description of habitat will be definable and defensible." MNR has yet to determine whether previous approaches used to delineate habitat, such as those used for the 42 endangered species regulated under the old law, are consistent with the new definitions of habitat under the *Endangered Species Act, 2007* and its underlying policies.

In November 2008, MNR released a new forest management guide in draft form. The Forest Management Guide for Conserving Biodiversity at the Stand and Site will provide direction to address the general habitat protections under the *Endangered Species Act, 2007* for many species at risk in the area of undertaking for commercial forestry. MNR states that "every effort will be made to provide timely updates to the direction in this guide" based on any changes in the at-risk status of species. Moreover, any species-specific habitat regulations that MNR enacts will supersede this guide. This draft guide also provides limited habitat protections for some species of special concern. For example, proposed 100 metre buffers around dens and 200 metre buffers around rendezvous sites will provide some protections for the eastern wolf that the *Endangered Species Act, 2007* does not.

Species-Specific Habitat Regulations

The *Endangered Species Act, 2007* allows – and, in limited circumstances, requires – MNR to prescribe habitat on a species-by-species basis through regulation for endangered, threatened and extirpated species. As described above, if MNR makes a regulation to define habitat for a particular species, the regulation prevails. MNR can prescribe any exceptions that the ministry views as appropriate within the regulated habitat.

The ministry has identified giving a high priority to developing habitat regulations for 40 species in the next five years. MNR has also indicated its intention to develop a detailed policy related to its procedures for species-specific habitat regulations. The ministry has internally identified a March 2009 public release date for this policy.

Habitat regulations may:

- describe the specific boundaries for the area and its features (e.g., vernal pools, forest canopy, woody debris, roost or nest trees, abandoned fields, created wetlands, buildings, bridges, road culverts, etc.);
- prescribe the areas where the species lives, used to live or is believed to be capable of living; and
- prescribe a habitat as an area that is larger than, smaller than, or equivalent to the area that would apply under the Act's general definition of "habitat."

The only limitation on the ministry's power to define habitat is that the Minister is not allowed to make a regulation that would effectively cause a species to become extirpated or extinct.

The ministry's policy on habitat protection, finalized in July 2008, states,

> The area prescribed in a regulation as habitat for the species may be larger, smaller or approximately the same as the area protected under the general definition of habitat. During the regulation making process, the government will consider the

area protected under the general definition of habitat, the best available scientific information on the species, the recovery strategy, the government response statement to the recovery strategy and the social and economic implications of habitat regulation.

It is problematic that MNR has the authority to choose to prescribe a habitat as an area that is *smaller* than the area described under the Act's general definition of "habitat." In effect, MNR can choose to decrease the amount of a species' habitat that is to be protected, potentially for non-ecological reasons.

Allowing MNR to mix socio-economic concerns with ecological needs at this critical initial stage of habitat protection is inconsistent with the overarching framework and intent of the legislation. Habitat should first be defined exclusively on a biological basis; other mechanisms – such as permits, agreements and exemptions – can thereafter be used to address specific socio-economic considerations. The regulation of habitat must be clear and empirical, and socio-economic compromises must be transparent and not disguised as habitat constraints.

In the few cases in which habitat loss is not a primary threat to a species at risk, regulating a smaller portion of its habitat may be acceptable. However, the flexibility of this aspect of the law is unnecessary due to all the later exceptions and exemptions that can be granted to address socio-economic concerns by allowing the destruction of habitat once it is regulated (see Sections 7 and 8 of this Special Report). The ECO strongly believes that the Act's habitat regulation-making powers should typically be applied to reaffirm and delineate the same area that is protected under the general definition, as well as any possible areas that a given species at risk could likely use for the purposes of recovery.

A Key to Successful Implementation

MNR should ensure that habitats are prescribed on an ecological basis, rather than being driven by economic or social constraints.

Proposals for habitat regulations will be posted on the Environmental Registry for public consultation when they are developed. Additionally, notices will be posted if regulations are not required for a given species at risk. MNR intends to consult with affected land owners – and, if there is a high interest in the species, any other stakeholders it judges necessary – prior to publicly consulting on habitat regulations and posting them on the Environmental Registry. Ideally, these consultations will advance, and not undermine, the necessary protections for a given species at risk.

The law requires that species-specific habitat regulations be proposed within two years of a species being newly listed as endangered and within three years for new threatened species. However, it is troubling that there is no requirement to even develop species-spe-

cific habitat regulations for the 128 endangered and threatened species that were listed when the Act came into force; in other words, habitat regulations are only mandatory for any species that are listed after June 30, 2008. However, in May 2007, the then Minister of Natural Resources stated that MNR would regulate the habitat of a minimum of ten of these species a year once the new law came into force. The Minister also stated that the following species would have their habitat regulated by June 2009:

- woodland caribou (*Rangifer tarandus caribou*);
- barn owl (*Tyto alba*);
- American badger (*Taxidea taxus jacksoni*);
- eastern prairie fringed-orchid (*Platanthera leucophaea*);
- peregrine falcon (*Falco peregrinus*);
- Jefferson salamander (*Ambystoma jeffersonianum*);
- few-flowered club rush (*Trichophorum planifolium*);
- western silvery aster (*Symphyotrichum sericeum*);
- Engelmann's quillwort (*Isoetes engelmannii*); and
- wood turtle (*Glyptemys insculpta*).

The *Endangered Species Act, 2007* also allows for a "flexible" approach in how it actually protects habitat, unlike the old law's strict provisions. The habitat of a species at risk may be afforded strict protections from human activities, or the habitat could be more actively managed with a mix of approved uses. The advisory panel advocated that this flexible approach be adopted. How the ministry applies this flexibility will be a focal issue in assessing the effectiveness of government conservation measures for species at risk in the years to come.

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Table 1: Timing and application of select aspects of the *Endangered Species Act, 2007* according to at-risk status and date of listing

At-risk Classification	Prohibition on killing, harming, and harassing	General Habitat Protection	Habitat Protection by Regulation	Recovery planning	Permits to kill or destroy habitat
Extirpated species (10 species)	June 30, 2008	no	discretionary	discretionary	yes
Endangered species carried over from the old law (42 species)	June 30, 2008	June 30, 2008	discretionary (replaces general habitat protection)	June 30, 2013	yes
Endangered species not previously listed, but now are listed (38 species)	June 30, 2008	June 30, 2013 (if no habitat regulation is in place)	discretionary (replaces general habitat protection)	June 30, 2013	yes
Endangered species listed in the future	upon listing	upon listing	within 2 years of listing (replaces general habitat protection)	within 1 year of listing	yes
Threatened species currently listed (48 species)	June 30, 2008	June 30, 2013 (if no habitat regulation is in place)	discretionary (replaces general habitat protection)	June 30, 2013	yes
Threatened species: listed in the future	upon listing	upon listing	within 3 years of listing (replaces general habitat protection)	within 2 years of listing	yes
Species of special concern: now listed (46 species)	no	no	no	June 30, 2013	n/a
Species of special concern: listed in the future	no	no	no	within 5 years of listing	n/a

section seven

permits, agreements, and instruments

Section 7 – Permits, Agreements, and Instruments

The *Endangered Species Act, 2007* creates numerous exceptions and exemptions, referred to by MNR as "flexibility tools," to allow otherwise prohibited activities, such as the killing of species at risk or the destruction of their habitat, to occur in particular circumstances. Case-specific exceptions authorized through the issuance of permits, agreements and other instruments are created directly under the Act, and are discussed in this section. Exemptions may be created by regulation and are discussed in section 8.

The old legislation did not allow for such "flexibility tools." The advisory panel supported this new approach but cautioned that, "(g)iven the clear and present dangers that threaten species at risk, exceptions provisions cannot be allowed to become loopholes." The ECO concurs with the advisory panel's warning. While the limited use of exceptions may be warranted, they should not be used to undermine the greater purpose of the law: the protection and recovery of species at risk.

Agreements and Permits under the Act

The law allows the government to enter into stewardship agreements with third parties for "the purpose of assisting in the protection or recovery" of species at risk. Such agreements may allow for otherwise prohibited activities to occur. For example, MNR could enter into a stewardship agreement with a conservation organization seeking to conduct a prescribed burn to restore habitat.

Similarly, permits may be issued to allow otherwise prohibited activities to occur. A permit may be issued if the Minister is of the opinion that it is necessary for human health and safety, or if the main purpose of the activity is to assist in the protection or recovery of a species at risk. A permit may also be issued if the Minister is of the opinion that the main purpose of the permit is not related to the protection or recovery of a species at risk, but the permit meets the following test:

- an overall benefit to the species will be achieved within a reasonable time;
- reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted; and
- reasonable steps to minimize any adverse affect are required as conditions of the permit.

Subject to Cabinet approval, the Minister may also issue a permit under section 17(2)(d) of the Act to allow otherwise prohibited activities to take place without achieving an overall benefit if "the activity will result in significant social or economic benefit to Ontario." To do so, the Minister must obtain a report from an independent expert that assesses whether the possible effects of the proposed activity will jeopardize the survival or recovery of the species at risk in question. The Minister must then be of the opinion that:

- the survival or recovery of the species at risk will not be jeopardized;
- reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted; and
- reasonable steps to minimize any adverse affect are required as conditions of the permit.

MNR's internal draft procedures state that permits under section 17(2)(d) are "...intended to permit large scale commercial, industrial, or cultural activities that have a negative impact on species at risk or their protected habitat. The intent is that these permits will only be considered in exceptional circumstances." While somewhat reassuring, it is unclear what circumstances will be judged to be exceptional. One measure of success of the Act will be the level of government restraint in exercising its discretion to issue section 17(2)(d) permits.

The law also provides that the government may enter into agreements with or issue permits to aboriginal persons. The only requirement of such agreements or permits is that they not "jeopardize the survival or recovery" of species at risk.

The requirements outlined above provide some safeguards when the Minister is considering the issuance of a permit or agreement. However, MNR should develop and consult the public on a detailed policy – that stresses a precautionary approach – on how it intends to apply these tests. The policy should also clearly explain what constitutes an "overall benefit." It will be important for the Minister to consider all relevant information when considering the issuance of a permit or agreement, including cumulative impacts of multiple permits and agreements related to a given species or its habitat.

A Key to Successful Implementation

MNR should rigorously apply the Act's "overall benefit" test and the precautionary principle, including an assessment of cumulative impacts, when screening the appropriateness of authorizing activities that would otherwise be prohibited under the *Endangered Species Act, 2007*.

Although MNR has committed in principle to prescribing various permits and agreements under this Act as instruments under the *Environmental Bill of Rights, 1993*, it has thus far failed to do so. Once prescribed, some permits and agreements will be posted on the Environmental Registry as regular instrument proposals and decision notices. For permits and agreements relating to a process carried out under the *Environmental Assessment Act* (which are not required to be posted as proposals for public comment), MNR has committed to posting information notices on the Environmental Registry.

Instruments Issued Under Other Laws

The Endangered Species Act, 2007 allows for prohibited activities to occur if an instrument (e.g., permit or approval) has been granted under other provincial or federal statutes, and the prescribed conditions have been met. The same general conditions apply to these exceptions as for permits issued directly under the *Endangered Species Act, 2007*. In the case of instruments issued under other legislation administered by MNR, such as the *Aggregate Resources Act*, the Minister must be of the opinion that the tests within the *Endangered Species Act, 2007* were met at the time the instrument was entered into, issued, made, or approved.

Instruments issued under legislation not administered by MNR are required to be prescribed by regulation under the Act in order to allow prohibited activities to occur. The Minister of Natural Resources must also have entered into an agreement with the "authorizing official" outside of MNR responsible for the issuance, making or approval of the instruments in question. Finally, the authorizing official must be of the opinion that the tests in the *Endangered Species Act, 2007* were met at the time the instrument was entered into, issued, made, or approved. For example, the Ministry of Environment (MOE) could theoretically allow an otherwise prohibited activity to occur in approving a permit to take water under the *Ontario Water Resources Act* or approving a certificate of approval under the *Environmental Protection Act*, if such instruments are prescribed and the tests are met.

As a result, it would be possible to except, through regulation and agreement, virtually any activities under any other legislation from the requirement to obtain a permit under the *Endangered Species Act, 2007*. This could include approvals with significant implications for species at risk. Therefore, the content of this regulation will merit extremely close scrutiny during its development and any subsequent amendments. As of January 2009, no statutes had been prescribed in this fashion under the Act.

A Key to Successful Implementation

MNR should exercise extreme caution in prescribing other statutes for exceptions from the *Endangered Species Act, 2007*, to ensure that only branches of government with a demonstrated track record in conservation are authorized to allow the harming of species at risk or the destruction of their habitat.

The ministry should develop and consult the public on its internal protocols and agreements with other branches of government – both within and outside of MNR – and explain how the tests of the *Endangered Species Act, 2007* will be met in allowing otherwise prohibited activities to occur. Further, the records of how the Minister or an authorizing official met these tests in reaching a decision should be readily available to the public.

section eight

exemptions

Section 8 – Exemptions

In addition to the case-specific exceptions (agreements, permits and other instruments) created directly under the Act (discussed in Section 7), the law gives a broad power to Cabinet to create, through regulation, wholesale exemptions from the prohibitions in the Act. For a summary of the key differences between these types of "flexibility tools," see Table 2.

Exemptions can apply to a category of activity (e.g., pits and quarries) or to an activity related to a particular species (e.g., killing butternut trees if certain conditions are met). The only limitation on the government's broad power to create exemptions is the requirement that, if the Minister of Natural Resources is "of the opinion" that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species, the Minister must first consult with an expert and obtain an expert report. The regulation can then only be made if certain conditions are met, including the requirement that the Minister be of the opinion that the regulation will not result in the species' extirpation from Ontario.

Another somewhat reassuring condition is the requirement that the Minister consider alternatives to the proposal for a regulation, "including entering into one or more agreements under section 16 or issuing one or more permits under section 17." This condition suggests that exemptions should only be created in cases where an exception to the prohibitions cannot be created through agreement or permit made in accordance with the Act.

Unfortunately, these conditions only arise if the Minister has formed an initial opinion (potentially without the benefit of expert advice) that triggers the expert consultation requirements. If the Minister is not of the opinion that the regulation is likely to have an adverse effect on species at risk, the regulation may be made without further scrutiny.

The ECO has significant concerns about the dangerous potential for abuse of the government's power to create exemptions by regulation. The overall effectiveness of the new legislation could be seriously undermined if the government does not exercise significant restraint and caution in using its discretion to exempt harmful activities.

Ontario Regulation 242/08

The public appears to share this type of concern, as evidenced by many of the 1,792 comments submitted during MNR's consultation on the first exemption regulation to be made under the Act. Ontario Regulation 242/08 was filed in June 2008 to coincide with the law taking effect, allowing for 23 different sets of exemptions from the prohibitions set out in the *Endangered Species Act, 2007*.

The exemptions created by O. Reg. 242/08 fall into three broad categories: exemptions for several major industrial and development sectors; exemptions for a limited number of activities that MNR believes are not harmful to species at risk; and exemptions for emergency

response, public safety and law enforcement. In particular, the regulation:

- exempts specific activities on an ongoing basis (e.g., field cultivation of American ginseng; possession or transport of an animal by a veterinarian to provide treatment);
- provides a limited transition period for other activities before the prohibitions under the Act will apply (e.g., commercial forestry); and
- allows for the creation of agreements to further exempt other activities on an indefinite basis (e.g., development and infrastructure).

Agreements under the Regulation

The "agreements" available for specified sectors under the existing exemption regulation are distinct from the stewardship agreements that may be made under the Act (see Section 7 of this Special Report). Effectively, agreements made under the regulation allow key components of the Act to be bypassed.

Agreements made under the Act must be "for the purpose of assisting in the protection or recovery of a species" listed in the Species at Risk in Ontario list regulation. Further, before entering into such an agreement under the Act, the Minister must consider any government response published in relation to a recovery strategy for the species affected by the agreement.

By contrast, agreements made under the existing exemption regulation need not be for purposes of protection or recovery of species at risk. Such agreements need only require that reasonable steps are taken to minimize adverse effects on the species, that the species' survival or recovery is not jeopardized, and that the agreements do not conflict with any measures that the Minister of Natural Resources intends to take to conserve the species.

Moreover, permits issued under the *Endangered Species Act, 2007* and approvals for instruments issued under other laws require the Minister to be "of the opinion that an overall benefit to the species would be achieved within a reasonable time" through specified requirements or conditions. This "overall benefit" test is not included as a condition for agreements made under the exemption regulation.

Exemption for Commercial Forestry on Crown Lands

Pursuant to the exemption regulation, commercial timber harvesting on Crown lands is exempted for one year – until June 30, 2009 – from the prohibitions relating to the destruction of habitat and the killing of species at risk. MNR states that it is "committed to working with the forestry sector to harmonize its existing processes within the new Act. After the proposed timeframe forest operations will be required to comply with the new Act." MNR states that there are currently 59 species at risk inhabiting the area of undertaking for commercial forestry.

The intent of the *Crown Forest Sustainability Act, 1994* is that "biological diversity should be conserved." However, the actual impacts on some species at risk from timber harvesting can be harmful. For example, MNR currently uses one of its forestry guidelines as the primary mechanism "to protect caribou habitat." In our 2006/2007 Annual Report, the ECO conducted a review of independent forest audits, which revealed "a clear and progressive pattern of woodland caribou habitat loss due to current forestry policy." As of January 2009, MNR had not released its new Forest Management Guide for Boreal Landscapes that will apply to the habitat of woodland caribou.

Exemption for Development and Infrastructure

Under the exemption regulation, various types of development and infrastructure can be exempted from the Act's prohibitions if an approval was made prior to the *Endangered Species Act, 2007* coming into force, and an agreement is entered into with the Minister of Natural Resources by June 30, 2010. These exemptions can apply to many different types of approvals under the *Planning Act*, the *Building Code Act, 1992*, the *Condominium Act, 1998*, the *Ontario Energy Board Act, 1998*, the *Drainage Act*, and the *Environmental Assessment Act*. These exemptions also can apply to numerous class environmental assessments and regulations made under the *Environmental Assessment Act*, including large projects or activities subject to declaration orders or *Environmental Assessment Act* designations. O. Reg. 242/08 does not specify the need for renewal or expiry dates for these agreements.

Exemption for Pits and Quarries

O. Reg. 242/08 provides that pits and quarries can be exempted from the Act's prohibitions if a licence or permit under the *Aggregate Resources Act* was held prior to the *Endangered Species Act, 2007* coming into force, and an agreement is entered into with the Minister of Natural Resources by June 30, 2010. The exemption also provides for areas of Ontario that have been newly designated under the *Aggregate Resources Act*, listed in Schedule 4 of O. Reg. 244/97; these exemptions are available to pit or quarry operators who obtain an agreement to address a species at risk on their property, and who made an application for zoning to the Superior Court before June 30, 2008. O. Reg. 242/08 does not specify the need for renewal or expiry dates for these agreements.

Exemption for Hydro-electric Generating Stations

Ontario Regulation 242/08 contains a series of criteria to exempt hydro-electric facilities from the prohibitions in the Act. The prohibitions do not apply until the third anniversary after the species in question is listed or after the date the species existed at the facility, whichever is later. This exemption only applies if construction began or all required approvals were obtained before the later anniversary date.

Like other specified sectors, this regulation also allows hydro-electric facilities to obtain an exemption from the prohibitions if an agreement is entered into with the Minister. Among other prescribed requirements, these agreements must include a condition that the effects of the operation of the station on the species be monitored. Unlike the exemptions for other industrial sectors, there is no deadline to obtain an agreement. Furthermore, the regulation does not specify the need for renewal or expiry dates for these agreements.

Exemptions for Specific Species

There are multiple exemptions pertaining to specific species in Ontario Regulation 242/08. For example, certain conditions allow for the cultivation of American ginseng (*Panax quinquefolius*) and the propagation of butternut trees (*Juglans cinerea*), while retaining protections for these plants that grow naturally in the wild. It is also permissible to possess cast antlers from the forest-dwelling boreal population of woodland caribou that have dropped naturally from an animal. The regulation also provides an exemption for the incidental catch of a species at risk that occurs during the course of licensed fishing and trapping.

Exemptions for Recreational Hunting and Fishing

With the coming into force of the *Endangered Species Act, 2007*, MNR closed the open hunting season for northern bobwhite (*Colinus virginianus*) under the *Fish and Wildlife Conservation Act, 1997*, in recognition of its endangered status. However, the ministry simultaneously created an exemption in Ontario Regulation 242/08 so that hunting northern bobwhite continues to be permitted on game bird hunting preserves. Similarly, other exemptions in Ontario Regulation 242/08 allow regulated sport fishing of Aurora trout (*Salvelinus fontinalis timagamiensis*), an endangered species, and the Great Lakes population of Atlantic salmon (*Salmo salar*), an extirpated species, to continue.

Beyond the specifics of these exemptions, permitting the stocking and harvesting of species at risk raises a variety of policy questions, including potential impacts on recovery strategies (e.g., gene flow, disease, etc.) and complications for the enforcement of the *Endangered Species Act, 2007*. It also raises issues of public perception surrounding the province's efforts to protect species at risk. Moreover, if indeed the population of a species at risk has risen to a level where harvesting is an appropriate consideration, the re-assessment of their at-risk status is likely warranted by COSSARO.

Other Exemptions

A series of other exemptions *permit* the killing of species at risk or the destruction of their habitat. For example, Ontario Regulation 242/08 contains a broad exemption that allows for actions to be taken if any person "reasonably" believes that there is an imminent risk

to the health or safety of a human being or animal. This exemption is overly broad. For example, it could be interpreted that it would be permissible to kill a species at risk if it was in the process of naturally preying upon another animal, such as an endangered cougar preying upon a deer. MNR should ensure that the regulation cannot be interpreted to apply in such a scenario.

Other exemptions apply to the protection of property, veterinarians, wildlife custodians, taxidermists, persons licensed for falconry, and zoos.

No Expiry Dates for Agreements, Permits, and Instruments

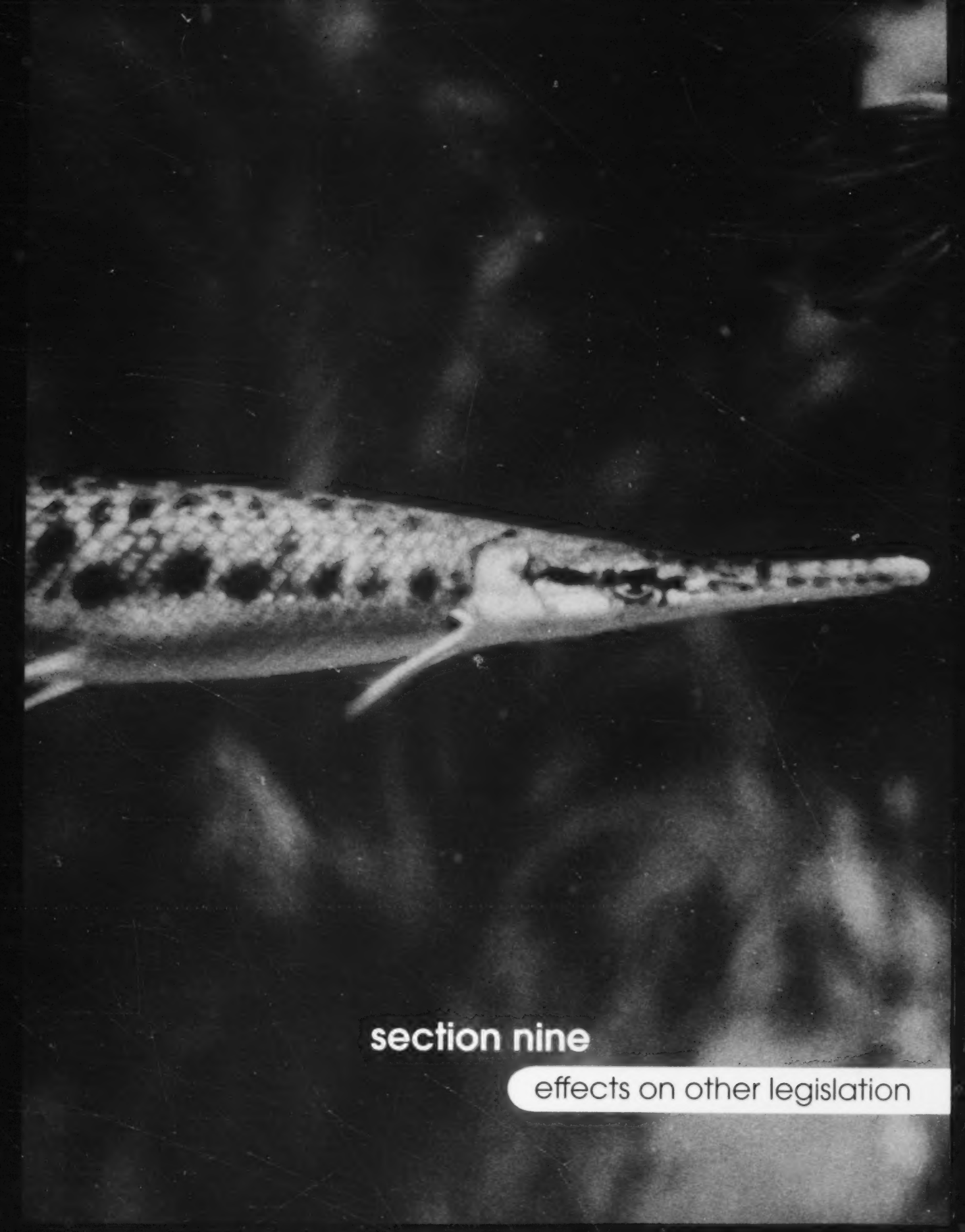
As noted above, there are several ways that certain activities may be excepted or exempted from the prohibitions set out in the *Endangered Species Act, 2007*. These "flexibility tools" can take the form of agreements or permits under the Act itself, agreements and outright exemptions under O. Reg. 242/08, and instruments under other laws that meet the requirements of the Act.

Neither the Act nor O. Reg. 242/08 requires that such permits, agreements, and instruments include an expiry date or be reviewed at specified intervals, although permits may be amended or revoked by the Minister. As such, it is possible that an exception or exemption – allowing the killing of species at risk and/or destruction of their habitat – could last in perpetuity without any statute-mandated review. That would not constitute good public policy.

The first permit to be issued under the *Endangered Species Act, 2007* illustrates this very concern. A permit has been issued to a quarry on Pelee Island that has conditions that will affect two endangered species: the blue racer snake (*Coluber constrictor foxii*) and the Lake Erie watersnake (*Nerodia sipedon insularum*). This permit does not contain a renewal or expiry date.

Table 2: Comparison of "flexibility tools" available under Ontario's species at risk regime.

Permits, Agreements and Other Instruments	*Exemptions*
Created under the Act	May be made by regulation
Apply to a specific activity/project	Can apply to an entire species or category of activity
Only take effect through agreements, permits and other instruments	Only take effect by regulation (but may depend on conditions or criteria set out in the regulation)
Must satisfy the overall benefit test set out in the Act (except section 17(2)(d)	The Minister must be of the opinion that the regulation will not result in the species' extirpation from Ontario
Examples: • Permit to catch redside dace *(Clinostomus elongatus)* as part of a habitat use study for the purposes of recovery • Permit to log a specific area on private land where there are wood turtles *(Glyptemys insculpta)*	Examples: • Exemption for possession or transport of game wildlife by a wildlife custodian authorized to keep the wildlife in captivity under the *Fish and Wildlife Conservation Act, 1997* • Exemption for the operation of a hydro-electric generating station if all specified criteria are met



section nine

effects on other legislation

Section 9 – Effects on other Legislation

The coming into force of the *Endangered Species Act, 2007* precipitated amendments to other statutes and regulations to harmonize those laws with the new legislation.

For example, amendments to Ontario Regulation 670/98 (Open Seasons – Wildlife) under the *Fish and Wildlife Conservation Act, 1997* (*FWCA*) were required to close the open season for hunting and trapping of American badger (*Taxidea taxus jacksoni*), gray fox (*Urocyon cinereoargenteus*), northern bobwhite (*Colinus virginianus*) and wolverine (*Gulo gulo*) in recognition of their protected status as endangered (American badger and northern bobwhite) and threatened (grey fox and wolverine) under the new legislation. MNR characterized this change as "complementary to and supportive of the legislative protection that will be provided under the (*Endangered Species Act, 2007*)."

Despite some efforts to bring other statutes and regulations into conformity with the *Endangered Species Act, 2007* where explicitly necessary, the ECO believes that revisions to other statutes, regulations and policies should be made to clearly harmonize them with the new legislation. For example, the definition of "significant habitat" of endangered and threatened species in the 2005 Provincial Policy Statement (PPS) under the *Planning Act* is not entirely consistent with the definition of habitat in the *Endangered Species Act, 2007*. The consequences of such discrepancies could become at issue before the courts or the Ontario Municipal Board. MNR has internally recognized the need for clarification on this issue.

The 2005 Provincial Policy Statement also specifically states that "development and site alteration shall not be permitted" in the "significant habitat of endangered species and threatened species." However, as this policy does not state that other types of activities such as infrastructure or aggregate operations are prohibited, one might interpret the wording of the PPS to mean that such activities are permissible in the habitat of threatened and endangered species, which is not the case. The ECO first warned of this inconsistency in our 2004/2005 Annual Report.

Habitat destruction can be caused by mineral exploration and development. Unfortunately, the *Endangered Species Act, 2007* does not empower MNR to order the withdrawal of lands from eligibility from staking. That authority rests solely with the Minister of Northern Development and Mines (MNDM) under the *Mining Act*. The ECO sees a need for a more effective mechanism to ensure the withdrawal of all lands that are necessary to comply with the *Endangered Species Act, 2007*. In cases where habitat has been identified as necessary to protect the survival of a species, but the lands in question have already been staked, the Minister of Natural Resources can consider exercising his or her own authority to issue a habitat protection order in order to ensure the protection of the species (see Section 12 of this Special Report).

section ten

effects on public rights

Section 10 – Effects on Public Rights

The *Endangered Species Act, 2007* confers some new rights to the public, such as a right of access to certain information. Further, by amendments made in June 2008 to O. Reg. 73/94, the *Endangered Species Act, 2007* was prescribed under the *Environmental Bill of Rights, 1993* for specified purposes. Accordingly, with the coming into force of the *Endangered Species Act, 2007* the public has gained some new opportunities to take part in environmental decision-making.

Right to Information

The *Endangered Species Act, 2007* requires that the Minister make the following information available to the public:

- information about the Act and the regulations;
- reports by COSSARO describing the criteria for assessing and classifying species;
- reports by COSSARO that list the species that should be assessed and classified, including species that should be reviewed and, if appropriate, reclassified;
- reports by COSSARO that classify a species as at-risk, assess a species as not at-risk or state that there is insufficient information available to classify a species;
- all recovery strategies and management plans, including the response that the Ontario government will take for each species;
- information about the implementation of recovery strategies and management plans;
- general information about permits and agreements under the Act; and
- general information about the enforcement of the Act.

The ECO expects that MNR will use the Environmental Registry to its fullest extent to make such information accessible to the public. However, it should be noted that the law gives the Minister the discretion to not make information available to the public if doing so could reasonably be expected to lead to a contravention.

Right to Notice and Comment

Proposals for regulations under the *Endangered Species Act, 2007* (subject to the exception described below) must be posted on the Environmental Registry for public comment for a minimum of 30 days. Because MNR is a prescribed ministry under the *Environmental Bill of Rights, 1993*, the public must also be given notice of and an opportunity to comment on proposals for any MNR policies related to the new legislation. Further, as discussed in Section 5 of this Special Report, MNR has committed to posting all recovery strategies and management plans on the Environmental Registry for public notification and consultation on the required government response.

In addition to general requirements for public notification and consultation, the Act sets out special requirements for giving notice of regulations that prescribe species-specific habitat or that create exemptions from the Act's prohibitions. These special requirements only apply if the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario, have any other significant adverse effect on the species, or result in a significant reduction in the number of members of the species that live in the wild in Ontario. In such a case, notice of a proposed regulation must be posted at least two months before the day the regulation is made. The notice must include certain information specified in the Act, including the Minister's opinion and reasons for the opinion, and a copy of the expert's report on the possible effects of the proposed regulation on the species. The ECO is encouraged by these specific notice requirements, which appear to acknowledge the special significance of such regulations to species at risk. However, the ECO is disappointed that these special requirements are only triggered by the Minister's opinion and do not apply in every instance.

Right to Make *EBR* Applications and to Whistleblower Protection

The *Endangered Species Act, 2007* was also prescribed under Parts IV and V of the *Environmental Bill of Rights, 1993*, which provide two powerful tools for public engagement. Under Part IV, any two members of the public may make an application for review of an existing policy, act, regulation or instrument; similarly, any two members of the public may make an application for review if they believe that a new policy, act or regulation of Ontario should be made or passed in order to protect the environment. Under Part V, any two members of the public may make an application for investigation of an alleged contravention of an act, regulation or instrument.

The right to apply for a review or investigation of existing acts, regulations or instruments only applies if the acts or regulations are prescribed in O. Reg. 73/94 and the instruments are prescribed under O. Reg. 681/94. While the *Endangered Species Act, 2007* and its regulations (other than the exception described below) have been prescribed, MNR has not prescribed the Act's instruments – a significant failure discussed in further detail, below.

Additionally, because the *Endangered Species Act, 2007* has been prescribed under O. Reg. 73/94, employees are afforded protection from employer reprisals for complying with or seeking enforcement of the *Endangered Species Act, 2007*, or for assisting with an investigation or giving evidence in a proceeding related to the Act.

Exceptions for the SARO List Regulation

O. Reg. 73/94 specifically excludes the Species at Risk in Ontario List regulation (O. Reg. 230/08) from certain requirements of the *Environmental Bill of Rights, 1993*. As a consequence, MNR is not required to post a proposal notice on the Registry or consult with the public before passing or amending the regulation. Further, the SARO list regulation is specifically excluded from the public's right to make an application for review.

This exception appears to be reasonable, as it ensures that the SARO list regulation is based on COSSARO's independent and scientific assessment, free from external influences and interests. However, the ECO believes that this restriction of the public's rights should be tempered by providing the public, as early as possible in the process, with COSSARO's full rationale for its decisions: (1) whether or not to list particular species on the SARO list; and (2) what classifications to give each species that appears on the SARO list. Providing this information would add transparency and accountability to the process, and could instil greater public confidence in the SARO list regulation and the strength of the *Endangered Species Act, 2007* itself.

MNR has indicated that it will post COSSARO's reports and annual reports on the Environmental Registry as information notices. While the Act does not specifically require COSSARO to provide a full rationale for its decisions in its reports, the ECO strongly urges COSSARO to do so in order for its decisions to be accountable and transparent to both the Ontario Legislature and the public.

In light of the exception under the *Environmental Bill of Rights, 1993* for the SARO list regulation, MNR posted an information notice on the Environmental Registry in May 2008 to provide general notice to the public that it would be filing the SARO list regulation (now O. Reg. 230/08). Further, MNR has indicated that it will post an information notice on the Environmental Registry relating to any request by the Minister under section 8 of the Act for COSSARO to reconsider the classification of a species at risk.

No *EBR* Rights Extended to Instruments

As described above, the *Endangered Species Act, 2007* and O. Reg. 242/08 provide for the issuance of instruments, such as permits and agreements, that allow activities to occur that would otherwise be prohibited by the legislation. MNR told the ECO in September 2007 and March 2008 that it intended to prescribe certain of those permits and agreements under the *Environmental Bill of Rights, 1993*.

In May 2008, the ECO urged MNR to move swiftly to prescribe such instruments under O. Reg. 681/94 made under the *Environmental Bill of Rights, 1993*. The ECO explained that this action was necessary in light of the imminent coming into force of the Act, and to ensure that MNR administers the new legislation in a transparent and accountable manner. In response, MNR advised that it anticipated posting a proposal on the Environmental Registry for an amendment to O. Reg. 681/94 sometime in the fall of 2008. The ECO subsequently requested that MNR post information notices on the Environmental Registry for all instruments issued from the time the Act would come into force on June 30, 2008 until such time as all instruments under the Act were prescribed. As of January 2009, MNR had not posted a proposal on the Environmental Registry to amend O. Reg. 681/94. However, MNR had posted information notices inviting public comment for two specific instrument proposals.

MNR's failure to prescribe instruments made under the *Endangered Species Act, 2007* and O. Reg. 242/08 means that the public does not have the right to receive notice of or comment on proposals for instruments issued under the Act. Further, the public is denied the ability to file applications for review or investigation related to instruments issued under the *Endangered Species Act, 2007*. Given the significant potential effects of such instruments on the environment – harming of threatened or endangered species, or the destruction of their habitat – the ECO is extremely troubled that Ontarians are being denied these important rights under the *Environmental Bill of Rights, 1993*.

Recommendation #5

The Environmental Commissioner of Ontario recommends that all instruments that may be issued pursuant to the Endangered Species Act, 2007 *and its regulations be prescribed under the* Environmental Bill of Rights, 1993.

No Right to Appeal Permits to Kill Species or Destroy Habitat

The new statute does not include provisions for appeals of a Minister's decision to issue an agreement, permit, or other instrument, although an instrument holder or party to an agreement can request a hearing if the Minister amends or revokes a permit or agreement.

In addition, there is no third party right to seek leave to appeal a Minister's decision to issue permits and agreements under the *Endangered Species Act, 2007*. Even if such permits and agreements were fully prescribed under the *Environmental Bill of Rights, 1993*, the public would not have the right to seek leave to appeal them because of the lack of corresponding instrument-holder appeal rights under the *Endangered Species Act, 2007* necessary to trigger third-party leave to appeal rights. As a result, members of the public will not be able to challenge MNR when it issues permits or agreements that allow for the killing of species at risk or destruction of habitat.

The ECO believes giving the public the right to seek leave to appeal ministry decisions to issue permits under the Act easily justifies creating a right of appeal for the potential permit holder. In light of the explicit reference to the precautionary principle in the statute's preamble, the onus lies with MNR to justify why a permit should be granted.

section eleven

stewardship activities and funding

Section 11 – Stewardship Activities and Funding

Effectively administering this law – and conserving biodiversity in general – requires that MNR have the necessary capacity and resources to carry out its responsibilities. The advisory panel stated that "financing the Act will be critical to its ultimate effectiveness" in its report to the Minister of Natural Resources.

MNR's core funding to pay for its own species at risk staff and program remained virtually unchanged over the last decade at approximately $2 million a year. For the 2008/2009 fiscal year, MNR has increased its core operating budget to just over $6 million for its species at risk program. This funding increase is a significant improvement, although it remains to be seen whether it is sufficient for the task at hand.

Stewardship Funding

The law does create a funding mechanism for third parties. It formally establishes the Species at Risk in Ontario Stewardship Program, the purpose of which is to support activities that preserve and rehabilitate habitat, implement recovery strategies and management plans, and educate the public. The support for stewardship activities is particularly important in southern Ontario, where the majority of the province's species at risk live or depend on lands that are privately owned.

This new program has been allocated $18 million over roughly four years, beginning in the fiscal year 2007/2008. MNR states that it will give preference to applicants that already have a minimum of 1:1 matching funds. In July 2007, MNR announced that $3 million would be made available for stewardship projects in the fiscal year 2007/2008.

In August 2007, the ministry gave these funds to 85 projects (out of a total 194 applications) run by a variety of organizations including conservation authorities, non-profit groups, universities, aggregate companies, and forestry companies. For the fiscal year 2008/2009, the ministry allocated approximately $5 million in funding for 108 projects.

Concerns have been expressed that MNR district offices were given little time to consider the applications for funding for both 2007/2008 and 2008/2009. District offices, at the frontlines of dealing with many species at risk issues, should ensure that projects are consistent with and reflect the same priorities as their own local activities. The recovery teams responsible for specific species at risk were also not consulted on the applications for funding. Moreover, the majority of funded projects do not appear to be directly related to existing recovery plans. For funding submissions for 2009/2010, MNR now is "strongly" recommending that applicants consult MNR staff and species experts.

Conflicts may arise in the future before the courts or other legal bodies, because provincial projects may lack the endorsement of a recovery team. A better approach is provided by the Habitat Stewardship Program for Species at Risk under the federal *Species*

at Risk Act, where the recovery team needs to endorse a project in order for third parties *to obtain funding*.

MNR also has established a fund to provide incentives to some landowners to conserve species at risk. Publicly announced in November 2008, the ministry is allotting $800,000 annually to share the costs of some existing programs, such as the development of individual Environmental Farm Plans that address the needs of species at risk. This Species at Risk Farm Incentive Program (SARFIP) will be administered by the Ontario Federation of Agriculture, and the Ontario Soil and Crop Improvement Association will lead its implementation. The full cost of select beneficial management practices (BMPs) will be covered, such as invasive alien plant control and enhancing wildlife habitat. MNR will fund eligible projects up to a total of $20,000 per farm.

MNR does have other incentive programs available for landowners to conserve species at risk. For example, the purpose of the Conservation Land Tax Incentive Program (CLTIP) is to recognize, encourage and support the long-term stewardship of specific categories of conservation land by offering tax relief to those landowners who agree to protect the natural heritage features of their property. However, MNR only allows landowners to participate and obtain relief from property tax if endangered species inhabit their land; no incentives exist for the habitats of threatened species or other species at risk. The ECO raised this specific concern in the Supplement to our 2004/2005 Annual Report, as did the advisory panel in its report to the Minister of Natural Resources. Only 60 properties across the entire province currently receive tax relief for the habitat of endangered species under CLTIP.

Recommendation #6

The Environmental Commissioner of Ontario recommends that MNR expand its Conservation Land Tax Incentive Program to provide financial incentives to private landowners to protect the habitat of a broader range of species at risk, including for recovery purposes.

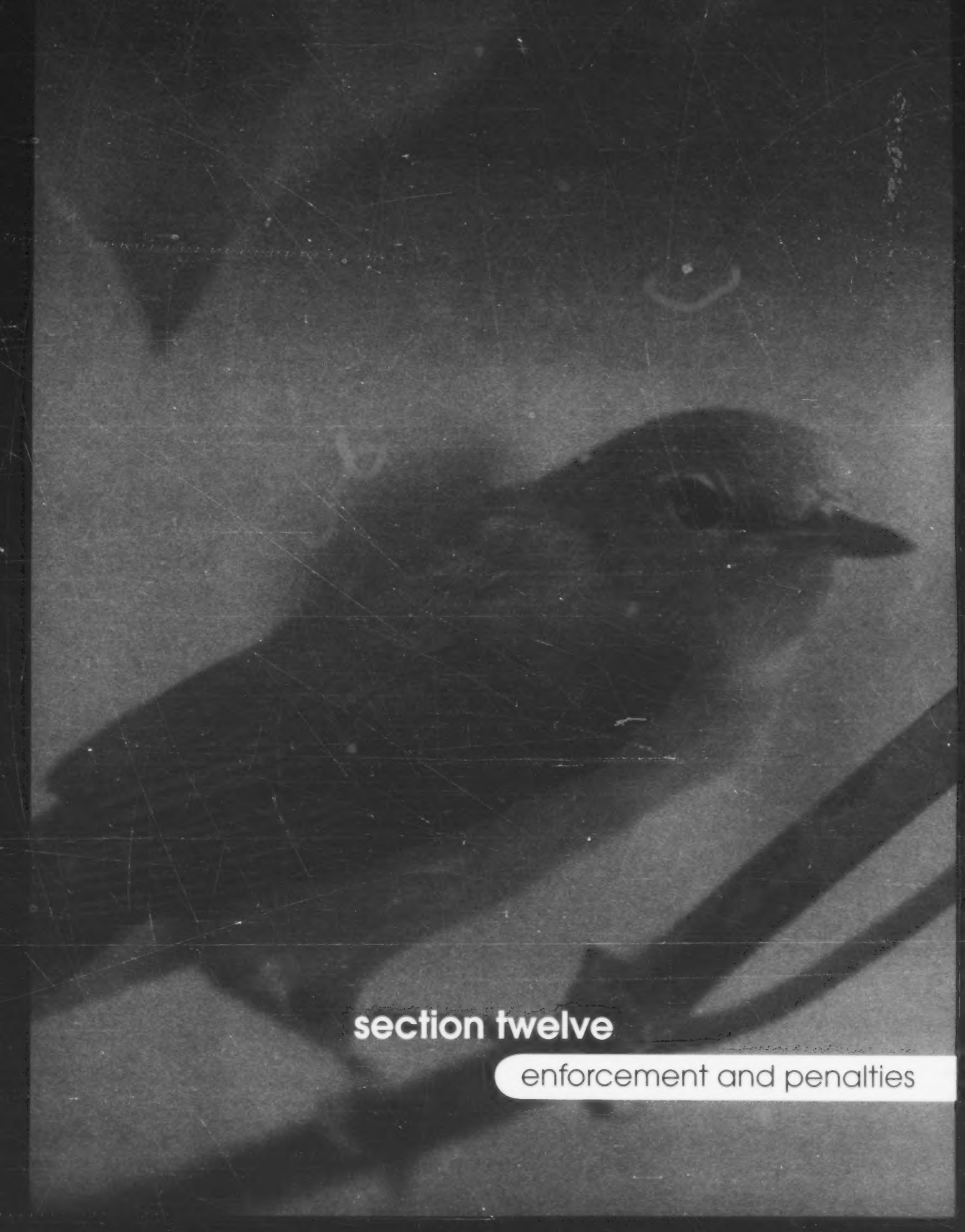
Advisory Committee

The law allows for the establishment of an advisory committee – the Species at Risk Program Advisory Committee (SARPAC) – to make recommendations to the Minister. It can be composed of up to 19 members. This committee may make recommendations to the Minister on a wide range of issues including the administration of the statute, the development of incentive programs and stewardship programs, the development of best management practices, public education and outreach programs, the preparation and implementation of recovery strategies and management plans, the assembly of scientific information, and the role of agreements and permits.

In August 2008, the Ontario government announced the membership of SARPAC. Fourteen stakeholders were appointed, affiliated with the forest industry, agriculture, developers, hunting and fishing organizations, conservation authorities, and conservation groups.

Unlike the legal requirements for the composition of COSSARO, the members of this committee are not required to be independent or possess relevant qualifications.

Monarch butterflies (*Danaus plexippus*) are listed as a species of special concern. Monarch populations are found across Canada, including southern Ontario, in habitats where milkweed plants are available for its caterpillars and wildflowers provide a source of nectar. The eastern monarch population migrates to Mexico each fall for the winter. The main causes of decline are logging, human disturbance and predation in Mexican overwintering sites, and the widespread use of pesticides and herbicides which kill the plants Monarchs rely on. Common milkweed, an important food source for Monarch larvae, is listed as a noxious weed under Ontario's *Weed Control Act*. Environment Canada is preparing a management plan, but its completion has been delayed.



section twelve

enforcement and penalties

Section 12 – Enforcement and Penalties

The *Endangered Species Act, 2007* contains improvements in terms of enforcement, offences, and penalties compared to its legislative predecessor. Conservation officers, and now park wardens, are empowered to enforce this law. The Act provides for numerous types of orders to address contraventions, including habitat protection orders.

Habitat Protection Orders

The Minister may issue an order to stop or prevent the destruction of or damage to the habitat of extirpated, endangered, or threatened species. This order may be issued for an area beyond what is prescribed by the specific habitat regulation for the species. Orders may also be issued if an activity is about to damage or destroy habitat, but the activity has not yet taken place. The ECO believes that any orders that are issued should be posted on the Environmental Registry as information notices for the purpose of public notification.

This particular provision is a dramatic improvement compared to the old *Endangered Species Act*. The previous law only made it an offence to actually destroy habitat, which made enforcement measures nearly impossible to prevent habitat destruction before it occurred. Under the new Act, a hearing can be requested to contest a habitat protection order. Although the law does not specify the hearing officer, it is logical that the hearing would be held before the Environmental Review Tribunal.

MNR has stated that it intends to develop a policy related to guidance on habitat protection orders. The ministry had internally identified December 2008 as a release date for this policy, but it had not been released as of January 2009.

Penalties and Court Orders

The *Endangered Species Act, 2007* establishes a number of contraventions as offences, including contravention of the prohibitions under the Act and contravention of the provisions of permits, agreements and various orders.

Corporations may be fined up to $1,000,000 per offence, and persons may be fined up to $250,000 per offence and can be imprisoned for up to one year. Upon conviction for a second or subsequent offence, corporations may be fined up to $2,000,000 and persons may be fined up to $500,000 and can be imprisoned for up to one year. The maximum fines referred to above may be multiplied by the number of animals, plants or other organisms that are killed, harmed, harassed, or captured during the offence.

Notwithstanding the maximum fines, an additional fine may also be imposed if the commission of the offence resulted in a monetary benefit to the corporation or person convicted. By comparison, the old legislation allowed for fines up to $50,000 and a jail term of up to two years. Increasing maximum fines may operate as a deterrent to prospective offenders.

It is unfortunate that the *Endangered Species Act, 2007* does not specify that any funds generated from permits or fines be directed to a separate account in the Consolidated Revenue Fund. For example, the *Fish and Wildlife Conservation Act, 1997* already establishes a Special Purpose Account that can be used by MNR for the conservation of species and their habitats.

Upon conviction, the court also may issue an order for compliance. Such an order could require the contravenor to refrain from engaging in any activity that could result in the continuation or repetition of the offence. The court also can order a payment to the Ontario government or any other party to remedy or avoid any harm to a species that resulted from the commission of the offence. This provision appears to respond to the advisory panel's recommendation that court-authorized payments to non-profit organizations involved in stewardship activities be allowed.

Piping plovers (*Charadrius melodus*) are listed as an endangered species. Recent pairs of this bird have nested in the Lake of the Woods area, Wasaga Beach Provincial Park, and near Sauble Beach. The main threat to this species is the loss of habitat due to recreational use of beaches and the ensuing disturbance of nesting sites. Domestic cats and dogs also prey on the eggs and young, as do gulls and raccoons. Changes in water levels due to recreational or building activities, dams, and seasonal storms also threaten the nesting sites. A recovery strategy is posted on the federal *Species at Risk Act* registry, along with three action plans.

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section thirteen

conclusion

Section 13 - Conclusion

The protection and recovery of species at risk is an integral part of conserving Ontario's biodiversity. By definition, the survival of these species is in jeopardy. The importance of having up-to-date laws that reflect today's environmental realities, modern science, and contemporary values cannot be overstated. Effective legislation serves as the last line of defence for the province's species at risk.

The province's new framework for protecting at-risk species is a vast improvement, in many ways, over the previous law and related policies. However, the new framework contains provisions that, if inappropriately exercised,could lead to the continued imperilment of many of Ontario's most vulnerable species.

Despite the science-based process for some aspects of the legislation, many of the law's provisions are highly discretionary in nature. The success of protecting and recovering species at risk relies on administering the Act in good faith. New flexibility tools should be used to alleviate conflicts that arose under the old law, not to accommodate a business-as-usual approach in which the environment suffers. When conflicts do arise between competing priorities, the protection of species at risk should prevail. Any exemptions from the *Endangered Species Act, 2007* must be truly exceptional and rare.

It is important that the *Endangered Species Act, 2007* be implemented in a transparent and accountable fashion. Unfortunately, it has not been fully prescribed under the *Environmental Bill of Rights, 1993*, a serious shortcoming that should be swiftly remedied.

The ECO firmly believes that the protection of species at risk should be a clear and indisputable priority across the entire Ontario government. The Ministry of Natural Resources should not be alone in its responsibility to conserve species at risk. Other ministries – Finance, Environment, Transportation, Municipal Affairs and Housing, to name but a few – have important roles to play.

The former Minister of Natural Resources has described the new law as a "win-win for all of us." The ECO believes that the only definitive "win" for species at risk is when their threats are reduced or eliminated, their population recovers, their habitat is secured, and they are de-listed. The ECO hopes that the Ontario government will embrace the opportunity presented by the *Endangered Species Act, 2007* to make this "win" a reality.

Key strengths and weaknesses of the *Endangered Species Act, 2007*

Strengths:

- ✔ Regulates a range of species at risk at different threat levels
- ✔ Impartial process to assess and list species
- ✔ Mandatory recovery strategies for endangered and threatened species
- ✔ Requires that government to respond to recovery strategies
- ✔ Contains prohibitions on the killing of species and the destruction of their habitat
- ✔ Recognizes the precautionary principle
- ✔ Provides greater opportunities for public participation

Weaknesses:

- ✖ Allows any activity to be exempted by regulation at any point in the future, subject to conditions
- ✖ Unclear whether recovery planning will be impartial and science-based
- ✖ Regulated habitat protection is discretionary for most species
- ✖ Vague requirements for what actions the government will take after a recovery strategy is developed
- ✖ Wide latitude to issue permits and agreements that may allow species to be killed or their habitat destroyed
- ✖ No mandatory expiry dates or periodic assessments of permits and agreements
- ✖ No mechanisms to prevent species from becoming at-risk

White prairie gentians (*Gentiana alba*) are listed as an endangered species. Its range is restricted to Walpole Island, in the delta of the St. Clair River, in southern Ontario. A survey in the year 2000 inventoried 45 plants at three sites on Walpole island. The main threat to this plant is habitat loss. Other threats include fire suppression to counter natural plant succession, which creates a shady environment unsuitable for prairie plants, and hybridization with another related species of gentian. At this time, the white prairie gentian does not have a completed recovery strategy.

Section 14 – Recommendations

Recommendation #1:

The Environmental Commissioner of Ontario recommends that the Government of Ontario establish a statutory responsibility for monitoring and reporting on the state of the province's biodiversity. (pg. 14)

Recommendation #2:

The Environmental Commissioner of Ontario recommends that MNR ensure that recovery teams and management teams be composed of members with the necessary expertise who are acting independently. (pg. 22)

Recommendation #3:

The Environmental Commissioner of Ontario recommends that the *Endangered Species Act, 2007* be amended to require the preparation of government responses for all listed species of special concern, in order to outline its specific conservation actions for those species. (pg. 23)

Recommendation #4:

The Environmental Commissioner of Ontario recommends that MNR ensure that expiry dates be used to ensure the periodic evaluation of permits, agreements and other instruments issued pursuant to the *Endangered Species Act, 2007* or its regulations. (pg. 42)

Recommendation #5:

The Environmental Commissioner of Ontario recommends that all instruments that may be issued pursuant to the *Endangered Species Act, 2007* and its regulations be prescribed under the *Environmental Bill of Rights, 1993*. (pg. 50)

Recommendation #6:

The Environmental Commissioner of Ontario recommends that MNR expand its Conservation Land Tax Incentive Program to provide financial incentives to private landowners to protect the habitat of a broader range of species at risk, including for recovery purposes. (pg. 54)

Section 15 - Keys to Successful Implementation

Recovery Planning:

MNR should develop and consult on guidelines that ensure recovery strategies and management plans are robust, effective, and defensible in order to adequately protect and recover species at risk and their habitat. (pg. 22)

Government Action:

MNR should ensure that its response statements to recovery strategies and management plans are robust, effective, and defensible and that its commitments are fully implemented in a timely fashion. (pg. 23)

Habitat Protection:

MNR should ensure that habitats are prescribed on an ecological basis, rather than being driven by economic or social constraints. (pg. 30)

Use of "Flexibility Tools":

MNR should rigorously apply the Act's "overall benefit" test and the precautionary principle, including an assessment of cumulative impacts, when screening the appropriateness of authorizing activities that would otherwise be prohibited under the *Endangered Species Act, 2007*. (pg. 35)

MNR should exercise extreme caution in prescribing other statutes for exceptions from the *Endangered Species Act, 2007*, to ensure that only branches of government with a demonstrated track record in conservation are authorized to allow the harming of species at risk or the destruction of their habitat. (pg. 36)

Appendix I: Past ECO Commentary on Species at Risk

1997 Annual Report:

"Managing Ontario's Natural Resources – MNR," *pp. 7-9.*

1999/2000 Annual Report:

"Protection of Species at Risk," *pp. 48-51.*

2001/2002 Annual Report:

"Additions to Ontario's Regulated Endangered Species," *pp. 100-101.*
"The Wolves of Algonquin Provincial Park," *pp. 101-105.*
"Can Forestry and Woodland Caribou Coexist?," *pg. 53.*
"Conserving Biodiversity in Ontario," *pp. 153-157.*

2002/2003 Annual Report:

"Creating a Biodiversity Framework in Ontario," *pp. 49-53.*
"Species at Risk," *pp. 134-139.*
"Wolf Conservation Strategy," *pp. 139-143.*

2003/2004 Annual Report:

"Species at Risk Guidance Documents," *pp. 23-24.*
"Update: Protecting the Wolves of Algonquin," *pp. 68-70.*

2004/2005 Annual Report:

"Excluding the Eastern Wolf from Species at Risk Protection," *pp. 26-27.*

"Ontario Biodiversity Strategy," *pp. 67-69.*

"Conserving Ontario's Wolves: Steps Forward," *pp. 86-89.*

"Species at Risk," *pp. 148-152.*

2005/2006 Annual Report:

"Conserving Ontario's Biodiversity: Moving Forward?," pp. 68-73.

"Provincial Strategy for Wolves," *pp. 73-76.*

2006/2007 Annual Report:

"Conserving Woodland Caribou: The Benchmark for Northern Sustainability," *pp. 75-81.*

"Reforming the *Endangered Species Act*," *pp. 96-97.*

"MNR's Caribou Recovery Strategy," *pp. 160-161.*

2007/2008 Annual Report:

"Biodiversity in Crisis," *pp. 74-80.*

"Wildlife Management: Ontario's Mammalian Predators," *pp. 198-205.*

Appendix II: Relevant Legislation, Regulations, Policies, and Instruments

Legislation:

A Review of Ontario's Species at Risk Legislation
- See Environmental Registry # AB06E6001.

Regulations:

Establish the Species at Risk in Ontario (SARO) List in Regulation under the *Endangered Species Act, 2007* (*ESA 2007*) consistent with Section 7 of the act
- See Environmental Registry # 010-3317.
- O. Reg. 230/08 (Species at Risk in Ontario List).

To establish new regulatory provisions under the *Endangered Species Act, 2007* to allow certain activities to continue
- See Environmental Registry # 010-3320.
- O. Reg. 242/08 (General).

Amendments to Regulations under the *Fish and Wildlife Conservation Act, 1997* to close the open hunting and/or trapping seasons for American Badger, Grey Fox, Wolverine and Northern Bobwhite and prohibit the harvest of the four species
- See Environmental Registry # 010-3338.

Multi-section amendments to Ontario Regulation 73/94 under the *Environmental Bill of Rights, 1993*
- See Environmental Registry # 010-2308.

Amendments to O. Reg. 681/94 (Classification of Proposals for Instruments) under the *Environmental Bill of Rights, 1993* to prescribe the *Endangered Species Act, 2007*
- Not released as of January 2009.

Regulations prescribing the habitat for specific endangered and threatened species under section 56 of the *Endangered Species Act, 2007*

- None released as of January 2009.

Policies:

Policy on habitat protection for endangered, threatened and extirpated species under the *Endangered Species Act, 2007*

- See Environmental Registry posting # 010-3403.

Explanation of key terms relating to habitat identification, description and protection under the *Endangered Species Act, 2007*

- Finalized July 2008.

General Habitat Protection Procedure

- Not released as of January 2009, but draft policy already exists.

Procedure for Habitat Regulations

- Internally targeted by MNR for public release in March 2009.

Habitat Protection Order guidance document

- Internally targeted by MNR for public release in December 2008, but not released as of January 2009.

Guidance on Stop Orders under the *Endangered Species Act, 2007*

- Not released as of January 2009, but draft policy already exists and targeted for public release in December 2008.

Recovery Planning Policy

- Internally targeted by MNR for public release in December 2008, but not released as of January 2009.

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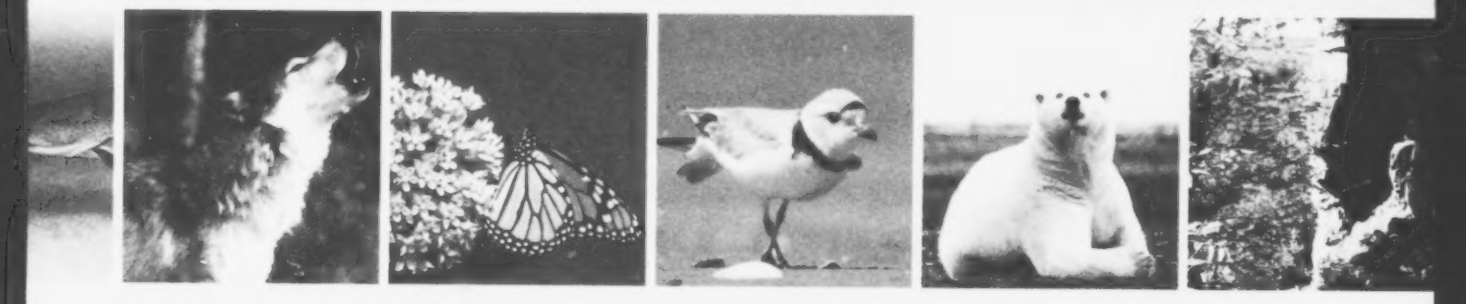
MNR p. 8, 12, 17, 25, 31, 46, 66, 67



Recovery Strategy Preparation Policy
- Internally targeted by MNR for public release in December 2008, but not released as of January 2009.

Procedure for Transitioning Recovery Strategies Developed Prior to June 30, 2008
- Not released as of January 2009, but draft already policy exists.

Stewardship Agreement Policy and Procedure
- Internally targeted by MNR for public release in November 2008, but not released as of January 2009.

Government Response Statement and Implementation Policy
- Internally targeted by MNR for public release in April 2009.

Policy on Permits
- Internally targeted by MNR for public release in March 2009.

Policy and Procedure on Species Augmentation and Reintroduction
- Internally targeted by MNR for public release in April 2009.

Management Planning Policy and Procedure
- Internally targeted by MNR for public release in 2009 or 2010.

Instruments:

Permits under sections 58 and 17 of the *Endangered Species Act, 2007* proposed to be issued to Pelee Quarries on Pelee Island
- See Environmental Registry # 010-3287.

Permit under clause 17(2)(c) of the *Endangered Species Act, 2007* for Removal of Butternut Trees by Invar (Freshway) Ltd.
- See Environmental Registry #010-5449.

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